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ABSTRACT

This hearing was held to address two bills designed to protect the privacy of users of video and library services, H.R. 4947 and S. 2361. The report opens with the full text of both bills and opening statements made by Representative Robert W. Kastenmeier, Senator Patrick J. Leahy, and Representative Carlos J. Moorhead. Testimony and prepared statements are then presented from Representative Alfred A. McCandless; Judith F. Krug, Director of the American Library Association (ALA) Office for Intellectual Freedom; Janlori Goldman, American Civil Liberties Union; Vans Stevenson, for the Video Software Dealers Association; and Richard A. Barton, Direct Marketing Association. Additional statements from Senator Paul Simon and Senator Alan K. Simpson are also presented. Additional materials reproduced in this report include correspondence with officials from the Federal Bureau of Investigation; the Special Libraries Association; People for the American Way; and the Association for Research Libraries. Relevant correspondence between congressmen is also included. (SD)

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VIDEO AND LIBRARY PRIVACY PROTECTION ACT OF 1988

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE

OF THE

HOUSE COMMITTEE ON THE JUDICIARY

AND THE

SUBCOMMITTEE ON TECHNOLOGY AND THE LAW

OF THE

SENATE COMMITTEE ON THE JUDICIARY

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

H.R. 4947 and S. 2361

LIBRARY PRIVACY PROTECTION ACT OF 1988

AUGUST 3, 1988

Serial No. 110
(House Committee on the Judiciary)

Serial No. J-100-90
(Senate Committee on the Judiciary)

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CONTENTS

TEXT OF BILLS

Page
H.R. 4947 2
S. 2361 9

OPENING STATEMENTS

The Honorable Robert W. Kastenmeier, a Representative in Congress from the State of Wisconsin; Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice 20
The Honorable Patrick J. Leahy, a Senator from the State of Vermont; Chairman, Senate Subcommittee on Technology and the Law 18
The Honorable Carlos J. Moorhead, a Representative in Congress from the State of California 25

WITNESSES

The Honorable Alfred A. (Al) McCandless, a Representative in Congress from the State of California 27
Prepared statement 28
Judith F. Krug, Director, Office for Intellectual Freedom, American Library Association, Chicago, IL 34
Prepared statement 37
Janlori Goldman, Esq., Staff Attorney, Project on Privacy and Technology, American Civil Liberties Union, Washington, DC 34
Prepared statement 37
Vans Stevenson, Director of Public Relations, Erol's, Inc., Springfield, VA; on behalf of the Video Software Dealers Association, Marlton, NJ 34
Prepared statement 78
Richard A. Barton, Senior Vice President, Direct Marketing Association, Washington, DC 34
Prepared statement with attachment 90

ADDITIONAL STATEMENTS

Statement of the Honorable Paul Simon, a Senator from the State of Illinois; Chairman, Senate Subcommittee on the Constitution 131
Statement of the Honorable Alan K. Simpson, a Senator from the State of Wyoming 133

ADDITIONAL MATERIALS

Invitation to testify from the Honorable Patrick J. Leahy and the Honorable Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, to the Honorable William S. Sessions, Director, Federal Bureau of Investigation, July 26, 1988; letter of response from Mr. Sessions to Mr. Rodino, August 2, 1988 ..... 136, 138
Letter from C. James Schmidt, Chair, Intellectual Freedom Committee, Office for Intellectual Freedom, American Library Association, Chicago, IL; to the Honorable Robert W. Kastenmeier, August 25, 1988 139
Letter from Judith F. Krug to the Honorable Robert W. Kastenmeier, September 23, 1988 140

Page

Letter from David R. Bender, Ph.D., Executive Director, Special Libraries Association, Washington, DC, to the Honorable Peter W. Rodino, Jr., September 26, 1988 142

Letter from John H. Buchanan, Jr., Chairman, and Arthur J. Kropp, President, People for the American Way, Washington, DC, to the Honorable Robert W. Kastenmeier, October 3, 1988 143

Letter from Duane E. Webster, Executive Director, Association of Research Libraries, Washington, DC, to the Honorable Robert W. Kastenmeier, September 26, 1988 145

Letter from the Honorable Robert W. Kastenmeier and the Honorable Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights, to the Honorable Louis Stokes, Chairman, Permanent Select Committee on Intelligence, September 22, 1988 146

Letter from Thomas M. Boyd, Acting Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to the Honorable Robert W. Kastenmeier, September 27, 1988 148

VIDEO AND LIBRARY PRIVACY PROTECTION ACT OF 1988

WEDNESDAY, AUGUST 3, 1988

U.S. House of Representatives, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, and U.S. Senate, Subcommittee on Technology and the Law, Committee on the Judiciary,

Washington, DC.

The subcommittees met, pursuant to notice, at 9:40 a.m., in room 2237, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice) presiding.

Present (House): Representatives Kastenmeier, Berman, Cardin, Moorhead, DeWine, Coble, and Slaughter.

Present (Senate): Senators Leahy and Simon.

Staff present (House): Michael J. Remington, chief counsel; Virginia E. Sloan, counsel; David W. Beier, counsel; Joseph V. Wolfe, associate counsel; and Judith W. Krivit, clerk.

Staff present (Senate): Ann M. Harkins, chief counsel; Marc S. Rotenberg, counsel; Susan P. Kaplan, counsel; and Jill D. Friedman, clerk.

Mr. Kastenmeier. The meeting will come to order.

[Copies of H.R. 4947 and S. 2361 follow:]

I

100TH CONGRESS
2D SESSION

H. R. 4947

To amend title 18, United States Code, to preserve personal privacy of individuals with respect to certain library use and use of services involving the rental or purchase of video tapes, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 29, 1988

Mr. KASTENMEIER (for himself and Mr. MCCANDLESS) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 18, United States Code, to preserve personal privacy of individuals with respect to certain library use and use of services involving the rental or purchase of video tapes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Video and Library Privacy Protection Act of 1988".

SEC. 2. CHAPTER 121 AMENDMENT.

(a) IN GENERAL.—Chapter 121 of title 18, United States Code, is amended—

(1) by redesignating section 2710 as section 2711; and

(2) by inserting after section 2709 the following:

"§ 2710. Wrongful disclosure of information relating to library use or video tape rental or sale

"(a) Prohibitions.—Except as provided in subsection (b), it shall be unlawful for a video service provider or library knowingly—

"(1) to disclose to any other person or entity any personally identifiable information about any user of covered services; or

"(2) to retain in a record any such information more than one year after—

"(A) that information is no longer necessary for the purposes for which it was collected; and

"(B) there are no pending requests or court orders for disclosure under this section.

"(b) Exceptions.—It is not a violation of subsection (a) of this section to disclose information about an individual—

"(1) to that individual;

"(2) with that individual's consent under the circumstances described in subsection (c) of this section;

"(3) to a law enforcement agency pursuant to an order under subsection (d) of this section; or

"(4) when necessary for a legitimate business purpose.

For the purposes of this subsection, engaging in the conduct prohibited by subsection (a) is not in itself a legitimate business purpose.

"(c) REQUIREMENTS FOR CONSENT EXCEPTION.—

"(1) IN GENERAL.—Except as provided in paragraph (2), the consent required for the exception under subsection (b)(2) is the prior written consent of the user—

"(A) specifying what information will be disclosed and who the specific recipient of that disclosure will be; and

"(B) given under the circumstances in which the user understands that the user may prohibit that disclosure without being refused services or suffering other discrimination.

"(2) ALTERNATIVE CONSENT.—In the case of a disclosure limited to the name and address of the user, that does not, directly or indirectly, reveal the category of service, or the title, description, or subject matter of service used, it is also sufficient consent for the purposes of the exception under subsection (b)(2) that—

"(A) the provider has given the user an opportunity to prohibit such disclosure;

"(B) such opportunity is given—

"(i) in a writing which clearly and conspicuously specifies what information will be disclosed; and

"(ii) under the circumstances described in paragraph (1)(B); and

"(C) the user may exercise that opportunity by making an appropriate mark on such writing.

"(d) Requirements for Court Order for Law Enforcement Exception.—

"(1) In general.—A court may order disclosure of personally identifiable information about a user of covered services to a Federal law enforcement agency or a State law enforcement agency authorized by State statute to seek such disclosure, if—

"(A) the user is given notice and afforded an opportunity to appear and contest such order; and

"(B) the law enforcement agency makes the showing described in paragraph (2).

"(2) What the agency must show.—In a court proceeding to issue an order under this subsection the law enforcement agency must show—

"(A) by clear and convincing evidence that the user has engaged in criminal activity;

"(B) that the information sought would be highly probative in a criminal proceeding relating to that activity;

"(C) that other specifically named and less intrusive investigative procedures have been tried and failed, and the particular details of that attempt and failure, or why the peculiar circumstances of this case make it reasonably appear that other less intrusive investigative procedures are unlikely to succeed if tried or are too dangerous to try; and

"(D) why, in the particular and individual circumstances of this case, the value of the information sought outweighs the competing privacy interests.

"(e) CIVIL REMEDY.—Any person or entity (including a governmental entity) that violates subsection (a) shall be liable to any person aggrieved by that violation for—

"(1) such equitable and declaratory relief as may be appropriate;

"(2) actual damages, but not less than the liquidated amount of $2,500;

"(3) punitive damages in appropriate cases; and

"(4) reasonable attorneys' fees and other litigation expenses reasonably incurred.

"(f) DEFINITIONS OF COVERED ENTITIES AND SERVICES.—For purposes of this section—

"(1) the term 'video service provider or library' means—

"(A) any publicly owned library open to the general public;

"(B) any library in a primary, secondary, or post secondary education institution—

"(i) that is a public institution; or

"(ii) any part of which receives Federal financial assistance;

"(C) any person or other entity engaging in a business that includes the renting or selling of prerecorded video tapes or similar audiovisual materials that—

"(i) operates in or affects interstate or foreign commerce; or

"(ii) is supplied with video tapes to rent or sell through distributors that operate in interstate or foreign commerce;

"(D) any person or other entity to whom a disclosure is made under subsection (b)(4), but only with respect to the information contained in that disclosure; or

"(E) any person acting as an agent of an entity described in subparagraphs (A) through (D), but only with respect to information obtained from such entity; and

"(2) the term 'covered services' means—

"(A) with respect to a library, all the services of the library; and

"(B) with respect to a provider of prerecorded video tapes or similar audiovisual materials, those services involving or incident to providing such tapes or materials.

"(g) PREEMPTION.—The section preempts only those provisions of State or local law that require disclosure which this section prohibits.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 121 of title 18, United States Code, is amended—

(1) in the item relating to section 2710, by striking out "2710" and inserting "2711" in lieu thereof; and

(2) by inserting after the item relating to section 2709 the following new item:

"2710. Wrongful disclosure of information relating to library use or video tape rental or sale.".

II

100TH CONGRESS
2D SESSION

S. 2361

To amend title 18, United States Code, to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials and the use of library materials or services.

IN THE SENATE OF THE UNITED STATES

MAY 10 (legislative day, MAY 9), 1988

Mr. LEAHY (for himself, Mr. GRASSLEY, Mr. SIMON, and Mr. SIMPSON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 18, United States Code, to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials and the use of library materials or services.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Video and Library Privacy Protection Act of 1988".

SEC. 2. CHAPTER 121 AMENDMENT.

(a) IN GENERAL.—Chapter 121 of title 18, United States Code, is amended—

(1) by redesignating section 2710 as section 2711; and

(2) by inserting after section 2709 the following:

"§ 2710. Wrongful disclosure of video tape rental or sale records and library records

"(a) DEFINITIONS.—For purposes of this section—

"(1) the term 'patron' means any individual who requests or receives—

"(A) services within a library; or

"(B) books or other materials on loan from a library;

"(2) the term 'consumer' means any renter, purchaser, or subscriber of goods or services from a video tape service provider;

"(3) the term 'library' means an institution which operates as a public library or serves as a library for any university, school, or college;

"(4) the term 'ordinary course of business' means only debt collection activities and the transfer of ownership;

"(5) the term 'personally identifiable information' includes information which identifies a person as having requested or obtained specific materials or services from a video tape service provider or library; and

"(6) the term 'video tape service provider' means any person, engaged in the business of rental, sale, or delivery of pre-recorded video cassette tapes or similar audio visual materials.

"(b) VIDEO TAPE RENTAL AND SALE RECORDS.—(1) A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d).

"(2) A video tape service provider may disclose personally identifiable information concerning any consumer—

"(A) to the consumer;

"(B) to any person with the informed, written consent of the consumer given at the time the disclosure is sought;

"(C) to a law enforcement agency pursuant to a court order authorizing such disclosure if—

"(i) the consumer is given reasonable notice, by the law enforcement agency, of the court proceeding relevant to the issuance of the court order and is afforded the opportunity to appear and contest the claim of the law enforcement agency; and

"(ii) such law enforcement agency offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and the information sought is highly probative and material to the case;

"(D) to any person if the disclosure is solely of the names and addresses of consumers and if—

"(i) the video tape service provider has provided the consumer with the opportunity, in a writing separate from any rental, sales, or subscription agreement, to prohibit such disclosure; and

"(ii) the disclosure does not reveal, directly or indirectly, the title, description, or subject matter of any video tapes or other audio visual material;

"(E) to any person if the disclosure is incident to the ordinary course of business of the video tape service provider; or

"(F) pursuant to a court order, in a civil proceeding upon a showing of compelling need for the information that cannot be accommodated by any other means, if—

"(i) the consumer is given reasonable notice, by the person seeking the disclosure, of the court proceeding relevant to the issuance of the court order; and "(ii) the consumer is afforded the opportunity to appear and contest the claim of the person seeking the disclosure.

If an order is granted pursuant to subparagraph (C) or (F), the court shall impose appropriate safeguards against unauthorized disclosure.

"(c) LIBRARY RECORDS.—(1) Any library which knowingly discloses, to any person, personally identifiable information concerning any patron of such institution shall be liable to the aggrieved person for the relief provided in subsection (d).

"(2) A library may disclose personally identifiable information concerning any patron—

"(A) to the patron;

"(B) to any person with the informed written consent of the patron given at the time the disclosure is sought;

"(C) to a law enforcement agency pursuant to a court order authorizing such disclosure if—

"(i) the patron is given reasonable notice, by the law enforcement agency, of the court proceeding relevant to the issuance of the court order and is afforded the opportunity to appear and contest the claim of the law enforcement agency; and "(ii) such law enforcement agency offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought is highly probative and material to the case;

"(D) to any person if the disclosure is solely of the names and addresses of patrons and if—

"(i) the library has provided the patron with a written statement which affords the patron the opportunity to prohibit such disclosure; and

"(ii) the disclosure does not reveal, directly or indirectly, the title, description, or subject matter of any library materials borrowed or services utilized by the patron;

"(E) to any authorized person if the disclosure is necessary for the retrieval of overdue library materials or the recoupment of compensation for damaged or lost library materials; or

"(F) pursuant to a court order, in a civil proceeding upon a showing of compelling need for the information that cannot be accommodated by any other means, if—

"(i) the patron is given reasonable notice, by the person seeking the disclosure, of the court proceeding relevant to the issuance of the court order; and

"(ii) the patron is afforded the opportunity to appear and contest the claim of the person seeking the disclosure.

If an order is granted pursuant to subparagraph (C) or (F), the court shall impose appropriate safeguards against unauthorized disclosure.

"(d) CIVIL ACTION.—(1) Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court.

"(2) The court may award—

"(A) actual damages but not less than liquidated damages in an amount of $2,500;

"(B) punitive damages;

"(C) reasonable attorneys' fees and other litigation costs reasonably incurred; and

"(D) such other preliminary and equitable relief as the court determines to be appropriate.

"(3) No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.

"(4) No liability shall result from lawful disclosure permitted by this section.

"(e) Personally identifiable information obtained in any manner other than as provided in this section shall not be received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State.

"(f) DESTRUCTION OF OLD RECORDS.—A person subject to this section shall destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsections (b)(2) or (c)(2) or pursuant to a court order.

"(g) SELECTION OF A FORUM.—Nothing in this section shall limit rights of consumers or patrons otherwise provided under State or local law. A Federal court shall, in accordance with section 1738 of title 28, United States Code, give preclusive effect to the decision of any State or local court or agency in an action brought by a consumer or patron under a State or local law similar to this section. A decision of a Federal court under this section shall preclude any action under a State or local law similar to this section.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 121 of title 18, United States Code, is amended—

(1) in the item relating to section 2710, by striking out "2710" and inserting "2711" in lieu thereof; and

(2) by inserting after the item relating to section 2709 the following new item:

"2710. Wrongful disclosure of video tape rental or sale records and library records.".

Mr. **Kastenmeier**. Today I am pleased that the Subcommittee on Courts, Civil Liberties, and the Administration of Justice joins with the Senate Judiciary Committee Subcommittee on Technology and the Law to hold a hearing on H.R. 4947 and S. 2361, bills to protect the privacy of users of video and library services.

Without objection, by unanimous consent, this meeting may be covered in whole or part by television and/or radio broadcast and/or still photography pursuant to Rule 5 of the Committee rules.

Before making any opening statement, I would like to turn to the distinguished Chairman of the Subcommittee on Technology and the Law, Senator Pat Leahy, for his opening remarks.

Mr. **Leahy**. Mr. Chairman, I appreciate that and the courtesy of you letting me go first.

As I mentioned, we have a vote that is going to occur very quickly in the Senate and I will cut out for a few minutes and do that and come back.

I am pleased to be here for this joint hearing of the Senate Judiciary Committee's Subcommittee on Technology and the Law and the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

I want to compliment you, sir, for the leadership you have shown, not only in this subject but in so many that I have had the honor of working with you on over the past several years on every area from privacy to high technology issues.

It has been a pleasure and it is an honor for me to be able to come over here and join you in what's a much nicer hearing room than we have over on the other side. There's better lighting.

Today, we are considering the Video and Library Privacy Protection Act. That is legislation that on the Senate side, I introduced with Senators Simon, Simpson and Grassley. And you, Mr. Chairman, and Congressman McCandless introduced companion legislation here.

Judge Bork's confirmation hearings last year really provided the forum for a national civics lesson. From Vermont to California, Americans exchanged their views on our system of government. No lesson from those hearings affected us more personally or deeply than the debate on the right to privacy.

Vermonters certainly let me know where they stood when reporters obtained a list of the movies that Judge Bork and his family rented and they published them in a Washington newspaper. It was disturbing to see that personal information can be fair game for reporters or lawyers or nosy neighbors.

Most of us rent movies at video stores and we check out books from our community libraries. These activities generate an enormous report of personal activity that, if it is going to be disclosed, makes it very, very difficult for a person to protect his or her privacy.

It really isn't anybody's business what books or what videos somebody gets. It doesn't make any difference if somebody is up for confirmation as a Supreme Court Justice or they are running the local grocery store. It is not your business. It is not my business. It is not anybody else's business, whether they want to watch Disney or they want to watch something of an entirely different nature. It really is not our business.

And if we are going to tell people, especially people who want to be in any form of public life, well, if you do, we are going to go all the way back and find out what you checked out at your public library, what you took out on videos or what you watch at night on television programs, then we are in a sorry state.

What a people's philosophy is, whether they are honest, whether they have integrity, those are valid questions for public office. Whether you want to watch a particular T.V. program or not isn't anybody else's business and this law is going to make sure that it stays nobody's else's business.

In 1986, I worked with the Chairman, with Congressman Kastenmeier, in landmark privacy legislation. That was the Electronic Communications Privacy Act. That protects communications from unlawful interception. We seem to be following along that line here. The Video and Library Privacy Protection Act would protect personally identifiable information from unlawful disclosure.

It prohibits the disclosure of library borrowing records and it will provide damages awards when information is unlawfully disclosed. I am encouraged by the bipartisan support for this, and, Mr. Chairman, again I can't compliment you enough for holding this hearing.

I am encouraged by the broad bipartisan support for the bill and will work hard for its enactment before the end of the Congress.

Mr. **Kastenmeier**. We thank the distinguished Senator for his opening remarks and it is indeed an honor to chair this committee with him. Needless to say, I am an admirer of Pat Leahy and have worked with him on many things, as he pointed out, such as the Electronic Communications Privacy Act and many other pieces of legislation which have come to fruition.

I have long been concerned about the increasing number and types of intrusions into the privacy of American citizens—by both private individuals and the Government. Over the years, this subcommittee has held both legislative and oversight hearings on this issue, and as a result, we have helped lead the fight to curb these troublesome invasions of privacy.

The Senate bill and House bill are another critical step along the road to meeting a particular problem. These bills follow in the footsteps of other privacy legislation we have considered and the important 1977 report of the Privacy Commission. These bills are an effort to keep up to date with changing technology and changing social patterns with respect to the use of materials which ought to be clearly private.

In any event, I am hopeful that we will be able to move these bills forward. I think our goal should be in enactment this year if at all possible. I would think there would be widespread support for this form of initiative, and I am looking forward to these hearings.

[The statement of Mr. Kastenmeier follows:]

OPENING STATEMENT

THE HONORABLE ROBERT W. KASTENMEIER

VIDEO AND LIBRARY PRIVACY PROTECTION ACT OF 1988

AUGUST 3, 1988

TODAY I AM PLEASED THAT THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE JOINS WITH THE SENATE JUDICIARY COMMITTEE SUBCOMMITTEE ON TECHNOLOGY AND THE LAW TO HOLD A HEARING ON H.R. 4947 AND S. 2361, BILLS TO PROTECT THE PRIVACY OF USERS OF VIDEO AND LIBRARY SERVICES.

I HAVE LONG BEEN CONCERNED ABOUT THE INCREASING NUMBER AND TYPES OF INTRUSIONS INTO THE PRIVACY OF AMERICAN CITIZENS -- BY BOTH PRIVATE INDIVIDUALS AND THE GOVERNMENT. OVER THE YEARS, THIS SUBCOMMITTEE HAS HELD BOTH LEGISLATIVE AND OVERSIGHT HEARINGS ON THIS ISSUE, AND AS A RESULT, WE HAVE HELPED LEAD THE FIGHT TO CURB THESE TROUBLESOME INVASIONS OF PRIVACY.

BEGINNING IN 1970 WITH THE PASSAGE OF THE FAIR CREDIT REPORTING ACT, AND ENDING LAST CONGRESS WITH THE ELECTRONIC COMMUNICATIONS PRIVACY ACT, THE CONGRESS HAS SHOWN ITS CONCERN OVER THE EXPANDING COMPUTERIZATION OF OUR SOCIETY, AND OVER THE PROTECTION OF EACH AND EVERY INDIVIDUAL'S "RIGHT TO BE LET ALONE." JUSTICE BRANDEIS'S FAMOUS WORDS CONTINUE TO RING TRUE, AND THEY ARE THE PREMISE OF THE LEGISLATION WE CONSIDER TODAY.

I AM ESPECIALLY PLEASED THAT IN OUR HEARING TODAY, WE ARE JOINED BY THE DISTINGUISHED GENTLEMAN FROM VERMONT, SENATOR PAT LEAHY, SINCE WE WORKED CLOSELY WITH HIM AND WITH HIS COLLEAGUES IN ACHIEVING PASSAGE OF THE ELECTRONIC COMMUNICATIONS PRIVACY ACT. ECPA WAS AN IMPORTANT STEP ALONG THE ROAD TO PROTECTING THE PRIVACY OF OUR EVERYDAY LIVES.

H.R. 4947 IS ANOTHER CRITICAL STEP ALONG THAT ROAD, ONE THAT I AM PLEASED TO CO-SPONSOR WITH OUR FIRST WITNESS TODAY, OUR COLLEAGUE, REPRESENTATIVE AL MC CANDLESS. H.R. 4947 FOLLOWS IN THE FOOTSTEPS OF OTHER HISTORIC PRIVACY LEGISLATION AND OF THE IMPORTANT 1977 REPORT OF THE PRIVACY COMMISSION, BY PROHIBITING THE DISCLOSURE OF PERSONAL INFORMATION WITHOUT THE INFORMED AND VOLUNTARY CONSENT OF THE INDIVIDUAL INVOLVED. THIS INFORMATION WOULD BE DISCLOSABLE ONLY UNDER THE NARROWEST OF CIRCUMSTANCES, SUCH AS WHEN A COURT ORDER IS ISSUED OR FOR APPROPRIATE BUSINESS PURPOSES. THE BILL PUTS TEETH INTO ITS MANDATE BY PROVIDING AGGRIEVED INDIVIDUALS WITH A CIVIL REMEDY, SIMILAR TO THAT IN THE CABLE ACT AND THE FEDERAL WIRETAP STATUTES.

THIRTY-EIGHT STATES AND THE DISTRICT OF COLUMBIA HAVE LAWS PROTECTING THE PRIVACY OF LIBRARY USERS. IN THE WAKE OF THE RELEASE TO A REPORTER OF JUDGE BORK'S FAMILY'S VIDEO RECORDS DURING HIS SUPREME COURT NOMINATION HEARINGS, STATE AND LOCAL LEGISLATION IS BEGINNING TO BE ENACTED TO PROTECT VIDEO VIEWERS.

BUT A STRONG, UNIFORM FEDERAL STANDARD IS CLEARLY NEEDED. DESPITE THE LIBRARY LAWS, THERE HAVE BEEN MANY ATTEMPTS TO OBTAIN PATRONS' RECORDS, UNDER CIRCUMSTANCES THAT I THINK WOULD VIOLATE

MOST PEOPLES' PERCEPTIONS OF THEIR RIGHT TO PRIVACY. WE WILL HEAR MORE ABOUT THESE INCIDENTS FROM THE AMERICAN LIBRARY ASSOCIATION'S REPRESENTATIVE. FORTUNATELY, THE LAWS, AND THE STRONG STANDARDS OF ALL OF THE MAJOR LIBRARY ASSOCIATIONS IN THIS COUNTRY, HAVE PROHIBITED THE RELEASE OF THE REQUESTED INFORMATION.

NOW WE ARE STARTING TO HEAR ABOUT SIMILAR INTRUSIONS INTO THE PRIVACY OF VIDEO USERS. JUDGE BORK'S EXPERIENCE MAY BE THE MOST PROMINENT, BUT THERE ARE ALSO REPORTS THAT VIDEO RECORDS ARE BEING SOUGHT IN DIVORCE CASES, IN CHILD CUSTODY DISPUTES, AND IN CRIMINAL PROCEEDINGS. THE VIDEO SOFTWARE DEALERS' ASSOCIATION REPRSENTATIVE WILL INFORM US ABOUT THESE INCIDENTS, AND ABOUT VIDEO DEALERS' ADMIRABLE ATTEMPTS TO REFUSE DISCLOSURE UNDER THEIR OWN CONFIDENTIALITY RULES AND, IN MOST CASES, EVEN WITHOUT SPECIFIC PROTECTIVE LAWS.

I STRONGLY BELIEVE THAT TOGETHER, THE FIRST AMENDMENT AND THE FOURTH AMENDMENT PROTECT NOT ONLY THE FREEDOM TO READ, BUT ALSO THE FREEDOM TO OBTAIN INFORMATION FROM WHATEVER SOURCE, AND WHATEVER MEDIUM. THEY PROTECT THIS FREEDOM FROM UNAUTHORIZED AND UNCONSENTED-TO INTRUSIONS.

IT IS APPROPRIATE, THEREFORE, THAT THIS LEGISLATION PROTECTS THE PRIVACY OF BOTH LIBRARY AND VIDEO USERS. WHEN THEY ENTER A LIBRARY, AMERICAN CITIZENS SHOULD NOT HAVE TO WORRY THAT A GOVERNMENT AGENT, OR A REPORTER, OR ANYONE ELSE, WILL BE ABLE TO FIND OUT WHAT THEY ARE READING. PEOPLE MUST NOT BE DETERRED FROM READING BY FEARS OF GOVERNMENTAL OR PRIVATE "SNOOPS." THESE PRINCIPLES APPLY AS MUCH TO CUSTOMERS OF VIDEO STORES AS TO

PATRONS OF LIBRARIES.

UNLESS THE CONGRESS PROVIDES FOR A STRONG NATIONAL STANDARD, THESE ABUSES WILL CONTINUE TO BE UNREGULATED. WE MUST NOT ALLOW THAT TO HAPPEN. I AM PLEASED THAT BOTH HOUSES OF CONGRESS ARE MOVING JOINTLY AND IN A BIPARTISAN MANNER TOWARD PASSAGE OF THIS LEGISLATION. WE EXPECT TO MOVE IT EXPEDITIOUSLY, AND WE EXPECT THAT IT WILL BECOME LAW BY THE END OF THE 100TH CONGRESS. SOME MAY SAY THAT THE INCREASING INVASION OF OUR CITIZENS' PRIVACY MAY BE UNSTOPPABLE AND INEVITABLE, BUT SO WILL BE THE EFFORTS OF THIS SUBCOMMITTEE, AND I BELIEVE THE CONGRESS AS A WHOLE, TO CURB THAT INVASION.

Mr. **Kastenmeier**. I would like to now yield to the gentleman from California, Mr. Moorhead.

Mr. **Moorhead**. Well, thank you, Mr. Chairman.

The legislation before us today, is H.R. 2316 and H.R. 4947 stems from the incident last summer when a newspaper reporter found out from a video store what video films Judge Bork rented and published a story about his preferences.

The immediate reaction to the Bork episode was a strong bipartisan response. Both the Democrats and Republicans deciding upon Judge Bork's judgeship became outraged and called for legislation. This bill is the result with Senators Leahy and Simon joined by Senator Grassley, sponsoring on the Senate side, Chairman Kastenmeier and our colleague, Mr. McCandless, sponsoring on the House side.

Mr. Leahy and Chairman Kastenmeier are to be commended for their long-standing commitment to privacy interests. By the same token I would like to commend our colleague, Mr. McCandless for his initiative on this legislation.

The legislation before us today covers libraries and direct marketeers as well as retail stores. The legislation does two basic things: It restricts what a library can say to anyone, including law enforcement personnel, about a library patron. This covers all library material and not just video. The Government has to fulfill a detailed subpoena requirement before it can get access to library records. On this part of the bill, I think it is important that we obtain the views of the law enforcement community.

The bill restricts video sellers through retail stores and through the mail. This approach goes far beyond fixing the Bork problem and attempts to regulate the mail industry.

The video store owners tend to support this legislation. The direct marketeers oppose its coverage of direct marketing. Their position is that they have complied with the privacy requirements for many years and there is no record to support legislative action against them. Having said that, I look forward to the testimony of all the witnesses today and I think it will be a very interesting hearing.

[The statement of Mr. Moorhead follows:]

STATEMENT OF THE HONORABLE CARLOS J. MOORHEAD

ON H.R. 4947

"VIDEO AND LIBRARY PRIVACY PROTECTION ACT OF 1988"

AUGUST 3, 1988

The legislation before us today, S.2361 and H.R.4947, stems from the incident last summer when a newspaper reporter found out from a video store what video films Judge Bork had rented and published a story about his preferences.

The immediate reaction to the Bork episode was a strong bipartisan response. Both the Democrats and the Republicans deciding upon Judge Bork's judgeship became outraged and called for legislation. This bill is the result with Senators Leahy and Simon joined by Senator Grassley sponsoring on the Senate side and Chairman Kastenmeier and our colleague Mr. McCandless sponsoring on the House side. Senator Leahy and Chairman Kastenmeier are to be commended for their longstanding commitment to privacy interests. By the same token, I would like to commend our colleague Mr. McCandless for his initiative on this issue.

This legislation before us today covers libraries and direct marketers as well as retail stores. This legislation does two basic things:

1. It restricts what a library can say to anyone including law enforcement personnel about a library patron. This covers all library material and not just video. The government has to fulfill a detailed subpoena requirement before it can get access to library records. On this part of the bill I think it is important that we obtain the views of the law enforcement community.

2. The bill restricts video sellers both through retail stores and through the mail. This approach goes far beyond fixing the Bork problem and attempts to regulate the mail industry.

The video store owners tend to support this legislation. The direct marketers oppose its coverage of direct marketing. Their position is that they have complied with privacy requirements for many years and there is no record to support legislative action against them. While I agree that the legislation is well intended, I think it is important that we proceed carefully to insure that we do not end up legislating in an area where in fact there are no problems.

Mr. **Kastenmeier.** I thank the gentleman from California. I am very pleased to call as our first witness today our colleague, Al McCandless. It was Congressman McCandless who introduced the first legislation in either body to protect the privacy of video store users.

I am pleased we were able to join together to cosponsor H.R. 4947. Congressman McCandless, you are a strong supporter of the privacy rights this bill provides, and we are looking forward to hearing your remarks.

TESTIMONY OF THE HONORABLE ALFRED A. (AL) McCANDLESS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. **McCandless.** Thank you, Mr. Chairman.

Members of the Committee, I appreciate the opportunity to appear before you today. In particular, I want to thank you, Chairman Kastenmeier, for your commitment to individual privacy. Including library services in the legislation was your initiative on the House side, and I believe this makes for a better bill.

At the heart of this legislation is the notion that all citizens have a right to privacy—the right to be left alone—from their Government and from their neighbor.

A glance at the list of Members of Congress sponsoring this legislation indicates that this notion transcends party lines and political philosophy.

There's a gut feeling that people ought to be able to read books and watch films without the whole world knowing. Books and films are the intellectual vitamins that fuel the growth of individual thought. The whole process of intellectual growth is one of privacy—of quiet, and reflection. This intimate process should be protected from the disruptive intrusion of a roving public eye.

What we're trying to protect with this legislation are usage records of content-based materials—books, records, videos, and the like.

Under our Constitution, content-based materials receive special protection. Only in the most extreme circumstances can the Government prohibit their distribution. Yet to the extent that receivers of the information are threatened with a loss of anonymity, the Constitutional right to distribute materials is licensed. The legislation you are considering, therefore, compliments the First Amendment.

Finally, there is an element of common decency in this legislation. It is really nobody else's business what people read, watch, or listen to.

We all felt a sense of outrage when Judge Bork's video list was revealed in print. His privacy was invaded. But what the incident also demonstrated was the tremendous storage and retrieval capabilities of even the smallest of today's businesses.

Currently, only a chain-link fence protects the privacy of consumers of content-based materials. That chain-link fence is the policy and discretion of an individual merchant or librarian. I ask the committees to build a brick wall—a Federal privacy right—around the individual: Pass H.R. 4947 and S. 2361.

Thank you for this opportunity to share my thoughts on the subject, and I would be happy to answer any questions you might have.

[The statement of Mr. McCandless follows:]

STATEMENT OF THE HONORABLE AL McCANDLESS

BEFORE A JOINT HEARING OF THE HOUSE SUBCOMMITTEE ON
COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE
AND THE SENATE SUBCOMMITTEE ON TECHNOLOGY AND THE LAW

CONSIDERING THE "VIDEO AND LIBRARY PRIVACY PROTECTION ACT OF 1988,"
H.R. 4947 AND S. 2361

AUGUST 3, 1988

Chairman Kastenmeier, Chairman Leahy, Committee Members:

I appreciate the opportunity to appear before you today. In particular, I want to thank you, Chairman Kastenmeier, for your commitment to individual privacy. Including library services in the legislation was your initiative on the House side, and I believe this makes for a better bill.

At the heart of this legislation is the notion that all citizens have a right to privacy--the right to be left alone--from their government and from their neighbor.

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There's a gut feeling that people ought to be able to read books and watch films without the whole world knowing. Books and films are the intellectual vitamins that fuel the growth of individual thought. The whole process of intellectual growth is one of privacy--of quiet, and reflection. This intimate process should be protected from the disruptive intrusion of a roving public eye.

What we're trying to protect with this legislation are usage records

OF CONTENT-BASED MATERIALS--BOOKS, RECORDS, VIDEOS, AND THE LIKE.

UNDER OUR CONSTITUTION, CONTENT-BASED MATERIALS RECEIVE SPECIAL PROTECTION. ONLY IN THE MOST EXTREME CIRCUMSTANCES CAN THE GOVERNMENT PROHIBIT THEIR DISTRIBUTION. YET TO THE EXTENT THAT RECEIVERS OF THE INFORMATION ARE THREATENED WITH A LOSS OF ANONYMITY, THE CONSTITUTIONAL RIGHT TO DISTRIBUTE MATERIALS IS LESSENED. THE LEGISLATION YOU ARE CONSIDERING, THEREFORE, COMPLIMENTS THE FIRST AMENDMENT.

FINALLY, THERE IS AN ELEMENT OF COMMON DECENCY IN THIS LEGISLATION. IT'S REALLY NOBODY ELSE'S BUSINESS WHAT PEOPLE READ, WATCH, OR LISTEN TO.

WE ALL FELT A SENSE OF OUTRAGE WHEN JUDGE BORK'S VIDEO LIST WAS REVEALED IN PRINT. HIS PRIVACY WAS INVADED. BUT WHAT THE INCIDENT ALSO DEMONSTRATED WAS THE TREMENDOUS STORAGE AND RETRIEVAL CAPABILITIES OF EVEN THE SMALLEST OF TODAY'S BUSINESSES.

CURRENTLY, ONLY A CHAIN-LINK FENCE PROTECTS THE PRIVACY OF CONSUMERS OF CONTENT-BASED MATERIALS. THAT CHAIN-LINK FENCE IS THE POLICY AND DISCRETION OF AN INDIVIDUAL MERCHANT OR LIBRARIAN. I ASK THE COMMITTEES TO BUILD A BRICK WALL--A FEDERAL PRIVACY RIGHT--AROUND THE INDIVIDUAL: PASS H.R. 4947 AND S. 2361.

THANK YOU FOR THIS OPPORTUNITY TO SHARE MY THOUGHTS ON THE SUBJECT, AND I WOULD BE HAPPY TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

Mr. Kastenmeier. Thank you, Congressman McCandless.

I would like to yield to the Senator from Vermont.

Mr. Leahy. Thank you.

Al, you mentioned the bipartisan support for this, and I agree with you. Democrats and Republicans may differ on a lot of issues, but we tend to agree when it comes to protecting privacy.

You mentioned what happened to Judge Bork. We all agree that that went beyond the pale.

I well remember when Senator Al Simpson came before the committee during the Bork hearings and announced what happened. That committee, as you know, was split between those supporting Judge Bork and those opposed to him. But it was unanimous—the feeling across the committee of outrage—when we learned of the disclosure.

Everybody said this just went beyond anything that should be done. I assume you share my view that that was kind of a low point in the protection of privacy for public officials.

Mr. McCandless. Yes, Senator, I certainly do.

Mr. Leahy. Do you also share my view, though, that this law goes beyond just a protection for the privacy of public officials, that it affects us all?

Mr. McCandless. Beg your pardon?

Mr. Leahy. Do you feel this bill is not just for public officials?

Mr. McCandless. No, sir. It is a cross section of the total population. Obviously, in my comments, I pointed out that privacy is the right of every individual irrespective of their occupation or status in life.

Mr. Leahy. Well, I compliment you for your support and work in this. You certainly have a well-deserved reputation for your own strong feelings. I compliment you for it.

Mr. Chairman, I have no other questions.

Mr. Kastenmeier. The gentleman from California.

Mr. Moorhead. I want to congratulate you for your work on this legislation. This is one question that has come to me from the direct marketing people. Did you mean this bill to go beyond retail establishments and cover their direct marketing activities?

Mr. McCandless. Yes. The bill would involve any distribution, be that retail, store-front, mail order. I realize there is some objection in that area of mail order or indirect distribution.

Mr. Moorhead. I don't know this to be true because I haven't talked to them in detail about it, but obviously from the stack of the solicitations we get, catalogs and so forth, I think the lists of people that buy from one mail order house are sold to every other one, and it is a general part of the business.

I just wondered whether the transmittal of those names would now be against the law if this is passed?

Mr. McCandless. Yes, it would be. Only the names, if the individual were not to check what we call the negative aspect of the record, then the name of the individual and the address only could be made available.

Mr. Moorhead. Do you know if there has been any showing of any violation of privacy by the mail order houses?

Mr. McCandless. Well, we are——

Mr. **Moorhead**. In telling what kind of materials people are buying?

Mr. **McCandless**. Mr. Moorhead, I am not privileged to that information relative to existing mail houses. As they merchandise the various commodities, there is no, in my experience, however, is that there is no restriction as to the selling of mailing lists or names on mailing lists according to subject matter, which I think is the basic root of what it was you were referring to earlier about receiving a lot of mail.

Because of your name and your position and what you may or may not have done in the field of merchandising and purchases, becomes an important thing to somebody else and when they consider you a customer. Therefore your name has a value to it.

Mr. **Moorhead**. It works similar if you give $10 to some organization, it seems like every other one solicits you for their consideration. I think the male order business runs a whole lot the same way. If you buy——

Mr. **McCandless**. I would hasten to add that we have to distinguish here between content material and what it is that we are talking about here in the way of a purchase.

Mr. **Moorhead**. I certainly agree with you totally. This is an outrageous kind of thing to have materials that we are buying and subscribing to, such as books and videos made public.

Mr. **Kastenmeier**. Would my colleague yield?

Mr. **Moorhead**. Yes.

Mr. **Kastenmeier**. The bill, as we fashioned it, really has a negative checkoff; that is to say, it assumes you can disclose the name and address of all persons, unless that person elects to say no. Now, that would probably not be very many people. So, therefore, for the most part names and addresses would be available, would presumably become part of these lists, and what we are talking about is something beyond that.

Mr. **McCandless**. Right.

Mr. **Kastenmeier**. That is to say, a person would have to consent to the—to a release of such information as the precise titles of movies taken out of a video store. So there is a, I think, a protection, which contemplates generally a wide release of names and addresses through the negative checkoff.

Mr. **McCandless**. I might compliment the chairman because at one point in the history of this bill, we had that available without the negative checkoff, and it was the chairman who in his infinite wisdom looked at that through his judicial eye and modified it, which I think made the bill better.

Mr. **Kastenmeier**. I'm sorry.

Mr. **Moorhead**. Thank you.

That is all the questioning I had.

Thank you for coming.

Mr. **Kastenmeier**. The gentleman from California, Mr. Berman.

Mr. **Berman**. No questions.

Mr. **Kastenmeier**. The gentleman from Ohio, Mr. DeWine.

Mr. **DeWine**. No questions, Mr. Chairman.

Mr. **Kastenmeier**. Gentleman from Maryland.

Mr. **Cardin**. No questions.

Mr. **Kastenmeier**. Gentleman from Virginia, Mr. Slaughter.

Mr. **Slaughter**. No questions, Mr. Chairman.

Mr. **Kastenmeier**. You get off easy, my colleague. If there are no further questions, we thank you, not only for your appearance here today, but for your leadership and we will try to work together to see if we can't bring this legislation to fruition.

I appreciate your appearance this morning.

Mr. **McCandless**. Thank you, Mr. Chairman.

Mr. **Kastenmeier**. Next the Chair would like to call as a panel Ms. Judith Krug, Director of the Office of Intellectual Freedom of the American Library Association; Janlori Goldman, Staff Attorney for Project of Privacy and Technology, American Civil Liberties Union; Vans Stevenson, Director of Public Relations for Erol's; and Richard Barton, Senior Vice President, Direct Marketing Association.

Ladies and gentlemen, you are most welcome. We have a vote on the House Floor. Ironically what happened is the Senate also has a vote at this very moment. So I think with the witnesses' agreement, before we go into the testimony of the four witnesses and they have differing testimony, but nonetheless touching on different aspects, but nonetheless I think it would be good to hear them in tandem as a group.

Before we do that, we will recess for 10 minutes, pending answering the vote on the House Floor and perhaps by then, also Senator Leahy might be able to return from his vote in the Senate.

Accordingly, the committee stands in recess for 10 minutes.

[Recess.]

Mr. **Kastenmeier**. The committee will come to order.

As the committee reconvenes after its recess for a vote, actually a vote of both the House and the Senate, and before we get to our four witnesses who have been introduced, our panel, I would like to greet, it is a great honor to greet our former colleague, the distinguished Senator from Illinois, Mr. Paul Simon, and I would like to call on Senator Simon, if he would for an opening statement.

Mr. **Simon**. I thank you very, very much, Mr. Chairman. Let me commend you for having this hearing.

I think one of the things that we, in the House and Senate have constantly been reminding ourselves is that one of the most fundamental things we ought to be doing is protecting basic freedoms, and protecting basic freedoms means the freedom that people have to have access to information without fear of what may happen to them as a result of requiring or requesting information.

I am old enough and if you will forgive me, Mr. Chairman, you are old enough along with me and these young people like Howard Berman around here don't remember this, but we lived through the McCarthy period.

Mr. **Berman**. I can remember that.

Mr. **Simon**. You can remember that? You are older than I thought, Howard, but I remember being stationed at Fort Holobird in the old Counter Intelligence Corps and we went through these classes where people said Frederick March contributed to Yugoslavians' children's relief, and therefore he is suspect and all of this.

I wrote a letter to the St. Lewis Post Dispatch suggesting that an investigation of this whole thing ought to be taking place, that something was happening that was very, very fundamentally wrong. And I got a letter back from him in a very friendly tone saying it is not safe for you to write that kind of a letter. You know, we forget how easily our basic freedoms can be circumscribed, and what we ought to be doing here is to maintain our basic freedoms, and I think that is what this hearing is all about, and I commend you, Mr. Chairman, for holding the hearing.

Mr. **Kastenmeier**. The committee thanks our former colleague for his poignant remarks and his memory of history.

We will proceed with the panel as has been introduced consisting of Ms. Krug, Ms. Goldman, Mr. Stevenson and Mr. Barton. We will start with Ms. Judith Krug, who is director of the Office of Intellectual Freedom for the American Library Association.

TESTIMONY OF JUDITH F. KRUG, OFFICE FOR INTELLECTUAL FREEDOM, AMERICAN LIBRARY ASSOCIATION; JANLORI GOLDMAN, ESQ., STAFF ATTORNEY, PROJECT ON PRIVACY AND TECHNOLOGY, AMERICAN CIVIL LIBERTIES UNION; VANS STEVENSON, DIRECTOR OF PUBLIC RELATIONS, EROL'S, INC., ON BEHALF OF THE VIDEO SOFTWARE DEALERS ASSOCIATION; AND RICHARD A. BARTON, SENIOR VICE PRESIDENT, DIRECT MARKETING ASSOCIATION

Ms. **Krug**. Thank you, Mr. Chairman.

Ladies and gentlemen, my name is Judith Krug. I am the Director of the American Library Association's Office for Intellectual Freedom.

The American Library Association is the oldest and largest national library association in the world. It is 112 years old, having been established in 1876. ALA speaks not only for our 45,000-member librarians, libraries, trustees and other interested citizens throughout the country, but we also speak to a large extent for librarianship throughout the world.

One of the most important aspects of the American Library Association is its intellectual freedom program. As a part of that program, we do take interest in and are concerned about the right of our citizens, the right of everyone in this country to read what they will, without fear of reprisal or without fear of being monitored in their reading.

The question of whether or not library records, those records which identify the uses that individuals make of library materials and services, are confidential, is not a new question for the ALA. In fact, we have had a policy on confidentiality since 1970, and this policy basically has two parts: first, that library circulation records, in fact all library records, which identify individuals with specific library materials and services, are private and confidential in nature and second, that such records should not be made available to any party, except pursuant to a court order issued by a judicial authority upon a showing of good cause.

The basis of this policy can be simply stated and I would like to quote Senator Leahy and probably paraphrase Mr. Kastenmeier and Mr. McCandless when they said it is nobody's business what you read, but your own. That is precisely the basis of the ALA confidentiality policy.

This belief of librarians in this country has been codified in our code of ethics. In fact, one of the Code's six articles is devoted specifically and solely to privacy and confidentiality of a patron's use of libraries. In addition, 38 States and the District of Columbia have passed statutes which protect the confidentiality of library use records. These laws, however, are not uniform in their coverage of either kinds of libraries or kind of services, and as a result, they do not mitigate the need for a Federal statute in this regard.

It is important to note, however, that not only the ALA policy, but also the statutes in all the 38 States and DC, do provide mechanisms for compliance with court orders issued by a competent judicial authority. In other words, librarians are not trying to be obstructionists.

We do seek to protect the first amendment rights of patrons and to safeguard their privacy, but we are not trying to be a road block. We are trying to preclude what we call fishing expeditions. To explain what these might entail, I would like to give you some examples of the kinds of "fishing expeditions" that my colleagues have been faced with in the past few years.

There was an incident in Virginia where a husband requested circulation records of his wife to prove, in their divorce trial, that she had been "exploring avenues of divorce before the papers were served."

There was an incident in Albany, New York, where a newborn infant was found abandoned in an alley by a local college student. She took the infant immediately to the proper authorities, but, nevertheless, the police investigating the abandonment went to her college librarian and asked to see the records of the books she checked out. They wanted to be certain she had not checked out books on infant care.

Just this past May in Baton Rouge, Louisiana, a parish sheriff's office ordered the parish library director to turn over a list of people who checked out books on the occult during the past year. The sheriff's office wanted this information because, and I quote, "a lot of times Satanic beliefs are connected with narcotics." Had there been any satanic cults in the parish? No. The sheriff said there hadn't been. He merely wanted the names, addresses and circulation records of library users, "to weed out the curious from the serious followers of Satan." How this was to be accomplished through library records remains a mystery to me and to my colleagues.

In a small Delaware community just a few weeks ago, the request was rather more threatening. The director of a public library received a call from an IRS agent. The director was informed that the FBI was going to subpoena borrower records. He refused to tell the librarian why these records were going to be subpoenaed. When the librarian explained to him the position of the library profession on confidentiality, and the fact that Delaware does have a confidentiality statute, the agent responded, "That is your problem. We will just seize the microfilm."

On the other side of the issue, I have a recent example from the Brooklyn Public Library, from a patron who telephoned the library seeking information on the recently concluded Soviet Communist Party Congress in Moscow. She was told that while the complete proceedings had not yet been published, information on the Congress could be found in the New York Times, available in the library's periodicals division. The woman responded, "But if I come in and ask to see that material, am I going to be reported?"

I consider this to be a serious chilling effect on the use of libraries in this country. Libraries, of course, are the only publicly available resource for ideas and information covering all the problems and issues that face us. It is our belief that use of this facility, this wonderful national resource, should be private and confidential and should be nobody's business but your own.

I thank you very much.

Mr. **Kastenmeier**. We thank you for your statement, Ms. Krug.

[The prepared statement of Ms. Krug follows:]

Summary of Testimony Presented on Behalf of the American Library Association

The role of libraries in this country is to provide unmonitored access to the broadest possible diversity of ideas and information. All persons in this country have a First Amendment right to seek and to use all publicly-available information and all have a right to privacy in doing so. These two rights are inseparable and form the essence of intellectual freedom, one of the guiding principles of the library profession in this country.

The question of whether or not library use records are confidential is not new. It is a question with which the ALA and its more than 45,000 member librarians, library trustees, and libraries have been concerned for many years.

Since 1970 the ALA has had a policy (a) that library circulation records are confidential in nature; and (b) should not be made available to any party except pursuant to a court order issued by a judicial authority upon a showing of good cause.

The basis of this policy may be simply stated: ALA believes that the reading interests of library patrons are and should be private and that any attempt to invade such privacy without a showing of a direct and legitimate need constitutes an unconscionable and unconstitutional invasion of the right of privacy of library patrons and the "right to read" implicitly guaranteed by the First Amendment.

This belief has been codified in the ALA's Code of Ethics, Article II of which reads:

> Librarians must protect each user's right to privacy with respect to information sought or received, and materials consulted, borrowed, or acquired.

In addition, thirty-eight states and the District of Columbia currently protect the confidentiality of library use records. These laws, however, are not uniform in their coverage of either kinds of libraries or services. As a result, they do not mitigate the need for a federal statute in this regard.

It is important to note that ALA's Policy, the laws of the various states and the District of Columbia, and the proposed legislation do provide mechanisms for compliance with court orders issued by a competent judicial authority after a showing of good cause. We do not seek to obstruct legitimate law enforcement investigations. We do seek to protect the First Amendment rights of patrons and to safeguard their privacy. The recurring use of libraries as investigative sites of first resort, what we call "fishing expeditions," is an unwarranted infringement of patrons' rights to unmonitored access to library materials and services. We recognize that while competing social values must on occasion be balanced, freedom of speech and the right to privacy should be compromised only by a compelling need, such need to be determined by a court of competent jurisdiction.

The ALA urges your strong support of this much-needed privacy legislation.

Thank you.

Statement of

Judith F. Krug
Director, Office for Intellectual Freedom
American Library Association
and
C. James Schmidt
Executive Vice President, Research Libraries Group, Inc.

before the Joint Hearing of the
Subcommittee on Technology and the Law
of the
Senate Judiciary Committee

and the
Subcommittee on Courts, Civil Liberties, and the
Administration of Justice
of the
House Committee on the Judiciary

on the
Video and Library Privacy Protection Act of 1988

August 3, 1988

This testimony, supporting the adoption of the Video and Library Privacy Protection Act of 1988, is presented on behalf of the American Library Association (ALA) by Judith F. Krug, director of the ALA Office for Intellectual Freedom and C. James Schmidt, chair of the Association's Intellectual Freedom Committee.

AMERICAN LIBRARY ASSOCIATION

The American Library Association, founded in 1876, is the oldest and largest national library association in the world. Its concerns span all types of libraries: state, public, school and academic libraries, as well as libraries serving persons in government, commerce and industry, the arts, the armed services, hospitals, prisons, and other institutions. With a membership of more than 45,000 libraries, librarians, library trustees, and other interested persons from every state and many countries of the world, the Association is the chief spokesman for the people of the United States in their search for the highest quality of library and information services. The Association works closely with more than 70 other library associations in the United States, Canada, and other countries, as well as with many other organizations concerned with education, research, cultural development, recreation, and public service. ALA is governed by its Council, comprised of 172 members.

The Intellectual Freedom Committee was established in 1940 by the Council. The Committee's statement of responsibility reads, in part, "To recommend such steps as may be necessary to safeguard the rights of library users, libraries, and librarians, in accordance with the First Amendment to the U.S. Constitution and the LIBRARY BILL OF RIGHTS (copy attached) as adopted by the ALA Council.

THE ROLE OF LIBRARIES AND LIBRARIANS IN A DEMOCRATIC SOCIETY

Ours is a constitutional republic - a government of the people, by the people, and for the people. But in order for this form of government to function effectively, its electorate must be able to inform itself - the electorate must have information available and accessible. The role of libraries as impartial resources providing information on all points of view is essential for our type of government and society, and must not be compromised.

Libraries are perhaps the greatest resource a free people can claim. They most definitely are the only places in our society where every person can find materials representing all points of view concerning the problems and issues confronting them as individuals and as a society. In addition, libraries make these materials available and accessible to anyone who desires or requires them, regardless of age, race, religion, national origins, social or political views, economic status, or any other characteristic.

PRINCIPLES OF THE LIBRARY PROFESSION

One of the guiding principles of the library profession in this country is intellectual freedom. To librarians, this concept involves two inseparable rights. The first is the First Amendment right to seek and obtain access to all publicly-available ideas and information. The second is the right to have what one has sought and what one has used kept private. The right to information cannot help but be inhibited if personal reading or research interests can and will become known to others without one's own consent.

It was, in fact, not all that long ago that, for example, responsible U.S. scholars working in the areas of Eastern European history, economics, and political science were publicly branded as "communists" because it became known that they read extensively from communist bloc publications, notwithstanding the fact that such publications constitute the primary source of information on such subjects.

Even today, there are people in every community who believe that a person's interest in a subject must reflect not merely his intellectual interests, but his character and attitudes. Thus, in the view of some people, a person who reads the "underground press" is branded as a radical; a person who reads atheistic tracts is marked an atheist; a person who reads sexually oriented literature is identified as a libertine; a person who reads works on apartheid is characterized as a racist; a person who reads gay literature is homosexual; and one who reads about the occult and satanism is "into" witchcraft. Such characteristics are not justified or warranted by such literary pursuits but if charged, they can be personally and professionally damaging.

The American Library Association has had a "Policy on Confidentiality of Library Records" (copy attached) since 1970. This formal policy was adopted at that time in response to attempts by U.S. Treasury agents to examine circulation records in a number of cities. Since 1970, thirty-eight states and the District of Columbia have enacted "Confidentiality of Library Records" statutes (list attached).

In 1981, the Association adopted a "Statement on Professional Ethics (copy attached) including a Code of Ethics. Article II of this Code reads:

> Librarians must protect each user's right to privacy with respect to information sought or received, and materials consulted, borrowed, or acquired.

The basis of both the Policy on Confidentiality of Library Records and Article II in the Code of Ethics may be simply stated: ALA believes that the reading interests of library patrons are and should be private and that any attempt to invade such privacy without a showing of direct and legitimate need constitutes an unconscionable and unconstitutional invasion of the right of privacy of library patrons and the "right to read" implicitly guaranteed by the First Amendment.

Perhaps some examples of the kinds of requests that librarians constantly receive will explicate our concern.

● In 1976, in New Mexico, police asked for circulation information on certain books to investigate a "Chicano guerilla movement" supposedly operating in the town.

● A divorced father in Illinois wanted access, in 1978, to the public library story hour registration records to make sure that his child was using his name and not that of the mother's current husband.

● Also in 1978, religious groups in Florida requested the names of persons who had read certain books. The purpose was to contact such readers and urge them to join a religious organization.

● In 1979, New York detectives asked for circulation records of a list of books on lie detectors because they suspected "somebody was trying to beat a lie detector test."

● That same year in Virginia, a husband requested circulation records of his wife to prove in their divorce trial that she had been "exploring avenues of divorce" before he filed the papers.

- In 1980, a hospital staff member in Illinois ordered sexually explicit films for use in therapy classes. The films were placed in the hospital library and the librarian was then requested - by another staff member - to provide him with the names of persons who had borrowed the films.

- In 1980, a local college student in Albany, New York, found a newborn infant abandoned in an alley. She took the infant immediately to proper authorities. Nevertheless, police investigating the abandonment went to her college librarian and asked to see the records of the books she had checked out. They wanted to ascertain if she had checked out books on infant care.

- In 1981, the Moral Majority in Washington State, demanded the Washington State Library release the names "of public schools and public school employees" who borrowed a 21-minute movie entitled ACHIEVING SEXUAL MATURITY.

- In 1985, law enforcement officials in Crawfordsville, Indiana, demanded public library circulation records on the grounds that these records were needed for research into "satanism."

- In Baton Rouge, Louisiana, in March of this year, the Rapides Parish Sheriff's Office ordered the parish library director to turn over a list of people who had checked out books on the occult in the last year. The sheriff's office wanted this information because, "a lot of times" satanic beliefs are "connected with narcotics." Had there been any satanic cults in the parish? No, the sheriff "merely" wanted the names, addresses and circulation records of library users "to weed out the curious from the serious followers of satanism." How this was to be accomplished through library records remains a mystery.

- In a small Delaware library, the request was rather more threatening. In May of this year, the director of a public library received a call from an Internal Revenue Service agent. The director was informed that the "IRS is going to subpoena the library's borrower records." The agent would not say why. When the director stated the profession's stance on the confidentiality of library records, the agent responded, "That's your problem--we will just seize your microfilm."

- And just last Thursday, ALA was informed (by a journalist, no less) that the police department of Whitestown, New York, had asked for the records of library patrons who checked out materials on satanism and the occult during the last four years.

In some of the states where these incidents occurred, there were statutes protecting the confidentiality of library use records. In others, there were not. Occasionally, these and other incidents led to the adoption of such statues.

It is important to note that ALA's Policy, and the laws of the various states and the District of Columbia, do provide mechanisms for compliance with court orders issued by a competent judicial authority after a showing of good cause. We do not seek to obstruct legitimate law enforcement investigations. We do seek to protect the First Amendment rights of patrons and to safeguard their privacy. The recurring use of libraries as investigative sites of first resort, what we call "fishing expeditions," is an unwarranted infringement of patrons' rights to unmonitored access to library materials and services. We recognize that while competing social values must on occasion be balanced, freedom of speech and the right to privacy should be compromised only by a compelling need, such need to be determined by a court of competent jurisdiction.

VARIATIONS IN SCOPE AND COVERAGE OF EXISTING STATE LAWS

Many of the statutes enacted by the thirty-eight states and District of Columbia which protect the privacy of library records did not adequately anticipate the ways technology has changed the character of library use. Thus, many of these statutes apply to only one or two kinds of libraries, i.e., public, school, and/or academic. In addition, many of the statutes refer only to materials "checked out" of libraries. Increasingly, however, library patrons use online databases. Moreover, none of these statues protect privacy rights of the information in multi-library, not to mention multi-state, networks, many of which share not only cataloging but also circulation information, for example, in the case of interlibrary loans. While many people continue to think of libraries as the small local facility where one checks out the latest best seller, widespread computerization has radically changed the face of libraries across this country.

Some of the state laws apply only to public libraries, not to school libraries. Some apply only to those libraries receiving state funds. This legislation would both extend the uneven coverage of the privacy protection now afforded to library patrons and would extend the scope of library use that is protected.

It is of critical importance that the right to free and unmonitored access to the widest possible diversity of publicly-available ideas and information not only be protected but also expanded.

BALANCING COMPETING INTERESTS

Any legislation considered by Congress of necessity must accommodate diverse interests. Among these potentially affected by H.R. 4947 and S. 2361, two are prominent - the direct mail organizations and law enforcement agencies. The first have little, if any, relationship to libraries and thus we make no comment about these interests.

Concerns which may be expressed by law enforcement agencies seem to ALA to be without basis. H.R. 4947 and S. 2361 would impose no more of a burden than is now the case for subpoenas and warrants. Given the evidence that law enforcement agents have in the past attempted to secure personally identifiable information from libraries without court orders, the protection afforded by this bill is necessary.

In closing, we quote from Senator Sam J. Ervin, Jr., who, in 1970, wrote: ". . . Throughout history, official surveillance of the reading habits of citizens has been a litmus test of tyranny."* Given the importance of privacy to the effectiveness of libraries in our democratic society, this legislation is desirable and the American Library Association urges that it become the law of the land (see attached resolution).

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*Letter to Secretary of the Treasury David M. Kennedy, dated July 9, 1970.

Library Bill of Rights

The American Library Association affirms that all libraries are forums for information and ideas, and that the following basic policies should guide their services.

1. Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation.

2. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.

3. Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.

5. A person's right to use a library should not be denied or abridged because of origin, age, background, or views.

6. Libraries which make exhibit spaces and meeting rooms available to the public they serve should make such facilities available on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use.

Adopted June 18, 1948.
Amended February 2, 1961, June 27, 1967, and January 23, 1980,
by the ALA Council.

POLICY ON CONFIDENTIALITY OF LIBRARY RECORDS*

The Council of the American Library Association strongly recommends that the responsible officers of each library, cooperative system, and consortium in the United States:

1. Formally adopt a policy which specifically recognizes its circulation records and other records identifying the names of library users to be confidential in nature.
2. Advise all librarians and library employees that such records shall not be made available to any agency of state, federal, or local government except pursuant to such process, order, or subpoena as may be authorized under the authority of, and pursuant to, federal, state, or local law relating to civil, criminal, or administrative discovery procedures or legislative investigative power.
3. Resist the issuance or enforcement of any such process, order, or subpoena until such time as a proper showing of good cause has been made in a court of competent jurisdiction.**

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*Note: See also ALA POLICY MANUAL 54.15 - CODE OF ETHICS, point #3, "Librarians must protect each user's right to privacy with respect to information sought or received, and materials consulted, borrowed, or acquired."

**Note: Point 3, above, means that upon receipt of such process, order, or subpoena, the library's officers will consult with their legal counsel to determine if such process, order, or subpoena is in proper form and if there is a showing of good cause for its issuance; if the process, order, or subpoena is not in proper form or if good cause has not been shown, they will insist that such defects be cured.

Adopted January 20, 1971; revised July 4, 1975, July 2, 1986, by the ALA Council

See reverse side for suggested procedures for implementation.

[ISBN 8389-6082-0]

12 a

SUGGESTED PROCEDURES FOR IMPLEMENTING

"POLICY ON CONFIDENTIALITY OF LIBRARY RECORDS"

When drafting local policies, libraries should consult with their legal counsel to insure these policies are based upon and consistent with applicable federal, state, and local law concerning the confidentiality of library records, the disclosure of public records, and the protection of individual privacy.

Suggested procedures include the following:

1. **The library staff member receiving the request to examine or obtain information relating to circulation or other records identifying the names of library users, will immediately refer the person making the request to the responsible officer of the institution, who shall explain the confidentiality policy.**

2. **The director, upon receipt of such process, order, or subpoena, shall consult with the appropriate legal officer assigned to the institution to determine if such process, order, or subpoena is in good form and if there is a showing of good cause for its issuance.**

3. **If the process, order, or subpoena is not in proper form or if good cause has not been shown, insistence shall be made that such defects be cured before any records are released. (The legal process requiring the production of circulation or other library records shall ordinarily be in the form of subpoena "duces tecum" [bring your records] requiring the responsible officer to attend court or the taking of his/her disposition and may require him/her to bring along certain designated circulation or other specified records.)**

4. Any threats or unauthorized demands (i.e., those not supported by a process, order, or subpoena) concerning circulation and other records identifying the names of library users shall be reported to the appropriate legal officer of the institution.

5. Any problems relating to the privacy of circulation and other records identifying the names of library users which are not provided for above shall be referred to the responsible officer.

Adopted by the ALA Intellectual Freedom Committee,
January 9, 1983; revised January 11, 1988

[confpol.pro]

13

CONFIDENTIALITY STATUTES

List of States

The following states have confidentiality of library records statutes:

Alabama
Alaska
Arizona
California
Colorado
Connecticut
Delaware
District of Columbia
Florida
Georgia
Illinois
Indiana
Iowa
Kansas
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Missouri
Montana
Nebraska
Nevada
New Jersey
New York
North Carolina
North Dakota
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
South Dakota
Tennessee
Virginia
Washington
Wisconsin
Wyoming

[confstat.lst]

STATEMENT ON PROFESSIONAL ETHICS, 1981

Introduction

Since 1939, the American Library Association has recognized the importance of codifying and making known to the public and the profession the principles which guide librarians in action. This latest revision of the CODE OF ETHICS reflects changes in the nature of the profession and in its social and institutional environment. It should be revised and augmented as necessary.

Librarians significantly influence or control the selection, organization, preservation, and dissemination of information. In a political system grounded in an informed citizenry, librarians are members of a profession explicitly committed to intellectual freedom and the freedom of access to information. We have a special obligation to ensure the free flow of information and ideas to present and future generations.

Librarians are dependent upon one another for the bibliographical resources that enable us to provide information services, and have obligations for maintaining the highest level of personal integrity and competence.

Code of Ethics

I. Librarians must provide the highest level of service through appropriate and usefully organized collections, fair and equitable circulation and service policies, and skillful, accurate, unbiased, and courteous responses to all requests for assistance.

II. Librarians must resist all efforts by groups or individuals to censor library materials.

III. Librarians must protect each user's right to privacy with respect to information sought or received, and materials consulted, borrowed, or acquired.

IV. Librarians must adhere to the principles of due process and equality of opportunity in peer relationships and personnel actions.

V. Librarians must distinguish clearly in their actions and statements between their personal philosophies and attitudes and those of an institution or professional body.

VI. Librarians must avoid situations in which personal interests might be served or financial benefits gained at the expense of library users, colleagues, or the employing institution.

15

AMERICAN LIBRARY ASSOCIATION
50 EAST HURON STREET · CHICAGO, ILLINOIS 60611 · (312) 944-6780

Resolution in Support of Video and Library Privacy Protection Act

WHEREAS, The First Amendment to the U.S. Constitution protects the freedom of all to read and to view, and

WHEREAS, a free society requires an informed citizenry in order to govern itself, and

WHEREAS, an informed citizenry must have open access to information wherever it may be sought, and

WHEREAS, this Association through policy and action staunchly defends the rights of all people in the U.S. to education and entertainment without the chilling constraint of another person or entity reviewing that activity, and

WHEREAS, legislation pending before the U.S. House of Representatives and Senate (the Video and Library Privacy Protection Act, H.B. 4947 and S. 2361) seeks to protect these constitutional rights.

THEREFORE, BE IT RESOLVED, that the American Library Association strongly supports the Video and Library Privacy Protection Act, H.B. 4947 and S. 2361.

Adopted July 13, 1988, by the ALA Council

Mr. **Kastenmeier**. Next we would like to call on Janlori Goldman, Staff Attorney, Project on Privacy and Technology, American Civil Liberties Union.

Ms. **Goldman**. Thank you very much. I appreciate the opportunity to be here today to testify on the Video and Library Privacy Protection Act legislation by both the House and Senate that would create a Federal right to privacy and video type rental or sale records and library circulation records.

The movies we view in the privacy of our home and the books we borrow from the library may reveal sensitive, personal information about us and should not be disclosed absent a compelling State interest in the information. Passage of the Video and Library Privacy Protection Act will be an important step towards allowing individuals to maintain some control over this information.

The ACLU strongly supports the legislation and we commend Congress for acting quickly to create a substantive privacy barrier around First Amendment protected information. In this age of information and computers, in which we are forced to turn over an enormous quantity and variety of personal information in exchange for doing business with others, we have relied on Congress to enact information privacy legislation.

We welcome the resurgence of privacy coalitions and the groundswell of public support for privacy that was reignited during last year's confirmation hearings. We hope that the momentum will not be lost and that we can continue to move forward to give citizens control over their personal information.

The Video and Library Privacy Protection Acts of 1988 prohibit video service providers and libraries from disclosing personally identifiable information except in limited circumstances, such as with the individual's consent or pursuant to a court order.

The legislation gives people control over their personal information divulged and generated in exchange for receiving services from video providers and libraries. These bills reflect the founding principle of the Privacy Act of 1974 information collected for one purpose may not be used for a different purpose without the individual's consent.

The need for the Video and Library Privacy Protection Act has been clearly established, not only be the unauthorized disclosure of the Bork family's video rental list, but by a history of unauthorized video and library record disclosures.

Thirty-eight States and the District of Columbia have statutes protecting the confidentiality of library records. In addition, major library organizations have adopted very strong policies on the confidentiality of library patron records.

Nothing makes more clear the need for this legislation than the unauthorized disclosure of the Bork family's video rental list. The City Paper reporter attempted to use the video list to create a profile of Judge Bork's private character. The unauthorized release of Judge Bork's video list, which was then used to investigate his character, cannot be condoned, just as we would not condone the breaking into his home to discover what books he reads.

The ACLU vigorously supports these bills. We believe, as does the majority of the American public, that privacy is an enduring and cherished value and that legislation is necessary to protect personal, sensitive information.

The public's concern for their privacy rights dramatically increased during Judge Bork's confirmation hearings. In fact, the majority of Senators who voted against his confirmation cited their concern about the Judge's limited view of the constitutional right to privacy. A broad-based, bipartisan coalition pulled together shortly after the disclosure of the Bork family's video list to support remedial legislation to ensure such a thing could never happen again.

Privacy is more than just the right to be let alone. Our right to privacy is intimately tied to our sense of individual autonomy—that when we are not committing a crime, we should be able to live our lives outside of the public eye. This particularly true when our activities implicate both First Amendment and privacy values. These are precisely the type of activities addressed by this legislation.

The Supreme Court, in *NAACP* v. *Alabama*, recognized the severe chilling effect on First Amendment freedoms that can result from the unauthorized disclosure of one's personal, political beliefs.

These precious rights have grown increasingly vulnerable with the growth of advanced information technology. The new technologies not only foster more intrusive data collection, but make possible increased demands for personal, sensitive information. This massive and sophisticated data collection increases the threat of private and Government surveillance.

New technologies enable people to receive and exchange ideas differently than they did at the time the Bill of Rights was drafted. Personal papers once stored in our homes are now held by others with whom we do business. Transactional information may be easily stored and accessed. Records of our reading and viewing histories are now maintained by libraries, and cable television and video companies. The computer makes possible the instant assembly of this information.

The ACLU is concerned about the danger posed by the aggregation of separately compiled lists to create profiles on individuals—the phenomenon of the womb-to-tomb dossier.

In its 1977 report, "Personal Privacy in an Information Society," the Privacy Protection Study Commission concluded that an effective national information policy must embody three major principles: minimize intrusiveness, maximize fairness and create legitimate, enforceable expectations of confidentiality. As a general rule, the Commission recommended, organizations that maintain a confidential record must be placed under a legal duty not to disclose the record without the consent of the individual, except in certain limited circumstances, such as pursuant to a search warrant or subpoena.

Even in such instances, the individual must have the right to challenge the court order before disclosure of the record. The Commission's finding most pertinent here is that there should be a close correspondence between an individual's expectation of the uses to be made of his or her information and the uses that are actually made of it.

The Commission noted the strong push for greater selectivity in the use of records about individuals to develop mailing lists. "That drive, coupled with new technological capabilities could change the character of the way direct-mail operations are conducted, a change called "troubling" by Publishers Clearing House and Computer World, who testified before the Commission.

The technological environment anticipated by the Commission has arrived and we must meet the threats to privacy posed by the uses of these systems. Last Sunday's New York Times reports that American Express is using new technology to develop a system to track card-holders' charge slips.

"The company's computer might identify a frequent traveler to Tokyo, or an avid tennis player. Working with American Express, a Tokyo hotel or a local sporting goods shop could then custom tailor advertising to the card-holder."

That is precisely the situation we are trying to prevent here with the exchange of First Amendment-related information, such as the movies we watch. This legislation is intended to be a protection for consumers, not a punishment on the industry. That is why it is supported by Erol's and VSDA and the library community. The legislation before us today promises to be another positive congressional response to the need for protections on personal, sensitive information.

The ACLU is hopeful that the Video and Library Privacy Protection Act will continue to garner broad, bi-partisan support. We look forward to continuing to work closely with you to ensure passage of this important and timely legislation.

Thank you.

[The statement of Ms. Goldman follows:]

SUMMARY OF ACLU TESTIMONY

I appear today on behalf of the ACLU to testify in support of the Video and Library Privacy Protection Acts, S.2361 and H.R.4947, legislation introduced in both the House and the Senate that would create a federal right to privacy in video tape rental or sale records and library circulation records.

The First and Fourth Amendments to the United States Constitution, when read together, give rise to a powerful argument in favoring of extending legal protection to video and library records. The movies we view in the privacy of our home and the books we borrow from the library may reveal sensitive, personal information about us and should not be disclosed absent a compelling state interest in the information. Passage of the Video and Library Privacy Protection Act will be an important step towards allowing individuals to maintain some control over this information.

The ACLU strongly supports the legislation and we commend Congress for acting quickly to create a substantive privacy barrier around First-Amendment protected information. In this age of information and computers, in which we are forced to turn over an enormous quantity and variety of personal information in exchange for doing business with others, we have relied on Congress to enact information privacy legislation.

The legislation before us today promises to be another positive Congressional response to the need for protections on personal, sensitive information.

The ACLU is hopeful that the Video and Library Privacy Protection Act will continue to garner broad, bi-partisan support. We look forward to continuing to work closely with you to ensure passage of this important and timely legislation.

TESTIMONY
OF
JANLORI GOLDMAN
STAFF ATTORNEY
ON BEHALF OF THE
AMERICAN CIVIL LIBERTIES UNION
ON
S. 2361 AND H.R. 4947
THE VIDEO AND LIBRARY PRIVACY PROTECTION ACTS OF 1988
BEFORE THE
SUBCOMMITTEE ON TECHNOLOGY AND THE LAW
SENATE JUDICIARY COMMITTEE
AND THE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE
HOUSE JUDICIARY COMMITTEE

AUGUST 3, 1988

Mr. Chairmen and Members of the Committee:

INTRODUCTION

I appear today on behalf of the ACLU to testify in support of the Video and Library Privacy Protection Acts, S.2361 and H.R.4947, legislation introduced in both the House and the Senate that would create a federal right to privacy in video tape rental or sale records and library circulation records. I am a staff attorney on the ACLU's Project on Privacy and Technology, a research project that addresses how computers impact on information and privacy. The ACLU is a nationwide, nonpartisan organization with 250,000 members dedicated to preserving citizens' constitutional rights.

The First and Fourth Amendments to the United States Constitution, when read together, give rise to a powerful argument in favoring of extending legal protection to video and library records. The movies we view in the privacy of our home and the books we borrow from the library may reveal sensitive, personal information about us and should not be disclosed absent a compelling state interest in the information. Passage of the Video and Library Privacy Protection Act will be an important step towards allowing individuals to maintain some control over this information.

The ACLU strongly supports the legislation and we commend Congress for acting quickly to create a substantive privacy barrier around First-Amendment protected information. In this age of information and computers, in which we are forced to turn over an enormous quantity and variety of personal information in exchange for doing business with others, we have relied on Congress to enact information privacy legislation.

THE VIDEO AND LIBRARY PRIVACY PROTECTION ACTS OF 1988

The Video and Library Privacy Protection Acts of 1988 prohibit video service providers and libraries from disclosing personally identifiable information except in limited circumstances, such as with the individual's consent or pursuant to a court order. The legislation gives people control over their personal information divulged and generated in exchange for receiving services from video providers and libraries. These bills reflect the founding principle of the Privacy Act of 1974-information collected for one purpose may not be used for a different purpose without the individual's consent.

EXCEPTIONS

The exceptions to the prohibition on disclosure are narrowly tailored, allowing disclosures with the individual's consent, for a legitimate business purpose or pursuant to a court order. The ACLU supports the legislation's requirement that, as a general rule, personally identifiable information may only be disclosed with the prior written consent of the individual.

The House bill requires the individual must be informed as to what information will be disclosed and to whom. Services may not be denied to individuals who choose not to allow the disclosures. This provision grants individuals the most meaningful control over their information, while allowing the recordholder to use the information as necessary for legitimate business purposes.

The ACLU also supports the section in both bills allowing a disclosure of the name and address of the patron where such disclosure does not directly or indirectly reveal the title or content of the service used and the individual has been given an opportunity to prohibit the disclosure.

The legislation's court order requirement, comparable to the standard embodied in the Cable Communications Policy Act of 1984, provides that before a court order can be issued, a law enforcement agency must present clear and convincing evidence that the record subject has engaged in criminal activity and that the information sought would be highly probative in a criminal proceeding. In addition, the House bill mandates the agency must show that its attempts to use less intrusive means to gain the information failed. The agency must also make the case that the value of the information sought outweighs the individual's privacy interests. Both bills require that upon issuance of a court order, individuals must receive notice and the opportunity to challenge the order. The ACLU supports this standard. We believe it is strong, effective and fair, and will not create an absolute ban on disclosure where the information is necessary for law enforcement purposes.

REMEDIES

The ACLU strongly supports the legislations' civil remedies section, providing that an individual harmed by a violation of the Act may seek compensation in the form of actual and punitive damages, equitable and declaratory relief and attorney's fees and costs. This section puts essential teeth into the legislation, ensuring that the law will be enforced by individuals who suffer as the result of unauthorized disclosures.

Statutory damages are necessary to remedy the intangible harm caused by privacy intrusions. Similar remedies exist in the Cable Communications Policy Act and the federal wiretap statutes. We have seen the promise of the 1974 Privacy Act fade due to the lack of an effective enforcement mechanism. We applaud members in both the House and the Senate for including a civil remedies section in the Video and Library Privacy Protection Acts.

THE NEED FOR LEGISLATION

The need for the Video and Library Privacy Protection Act has been clearly established, not only by the unauthorized disclosure of the Bork family's video rental list, but by a history of unauthorized video and library record disclosures.

Library Records

Thirty-eight states and the District of Columbia have statutes protecting the confidentiality of library records. In addition, major library organizations have adopted very strong policies on the confidentiality of library patron records. The American Library Association adopted a policy on confidentiality of library records in 1970 in response to attempts by United States Treasury agents to gain access to circulation records.

There have been recent reports that the FBI has been asking library personnel in various libraries around the country to divulge patrons' records. However, James Geer, Assistant Director of the FBI's Intelligence Division recently testified: "I can assure you that the FBI is not now nor has it even been interested in the reading habits of American citizens. No records or reading lists of any U.S. citizen have been sought or obtained by the FBI in any of our contacts with librarians either within or outside the New York City area." (Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 100th Cong., 2nd Sess., 8 (July 13, 1988) unofficial transcript. Hereinafter "FBI hearing"). In his testimony, Mr. Geer also noted: "I have found no situation at all where we got any records or any information on any U.S. person as far as library records or personal information goes, any. . . . And if we find that we are about to violate a state statute in any sense, we will back away from that." (FBI hearing at 33, 28).

As the Bureau has indicated, and as Representative

Kastenmeier pointed out in his statement in the June 29, 1988 Congressional Record, if the FBI is not interested in obtaining library patrons' records, then the Video and Library Privacy Protection Act will not interfere with the Bureau's activities. In this instance, any exception for national security purposes is unjustified and will weaken the intended strength of this legislation.

Video Rental Lists

Nothing makes more clear the need for this legislation than the unauthorized disclosure of the Bork family's video rental list. The City Paper reporter attempted to use the video list to create a profile of Judge Bork's private character. The unauthorized release of Judge Bork's video list, which was then used to investigate his character, can not be condoned, just as we would not condone the breaking into his home to discover what books he reads.

Although the disclosure of Judge Bork's list may be the most sensational and well-known disclosure, other similar incidents have been documented. For instance, Jack Messer, vice-president of the Video Software Dealer's Association and owner of 22 video rental stores, reported in the Philadelphia Inquirer that the attorney for the wife in a divorce proceeding made an informal request for the records of every film rented by her husband in an effort to show that, based on his viewing habits, he was an unfit father.

Again, the movies we watch in the privacy of our own homes may reveal a great deal about our politics and personalities, the most personal, sensitive aspects of ourselves that we may choose to express outside the scope of the public's gaze.

THE LEGISLATION'S GENESIS: THE CONCERN FOR PRIVACY

The video rental list issue gained national attention during the confirmation hearings of Judge Robert Bork after a reporter for City Paper obtained a list of the video tapes rented by Judge Bork and his family. At that time, many Senators, including Senators Alan Simpson, Joseph Biden, and Patrick Leahy, expressed outrage at this intrusion into the Bork family's privacy. Senator Leahy characterized the disclosure of the tapes as "an issue that goes to the deepest yearning of all Americans that we are here and we cherish our freedom and we want our freedom. We want to be left alone." (Nomination of Robert H. Bork to be Associate Justice of the Supreme Couret of the United States: Hearings before the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 1374 (September 28, 1987). Hereinafter "Confirmation Hearings"). Senator Simpson specifically asked for the ACLU's reaction to the list disclosure. By the end of the day, we responded with a letter to the editor of City Paper and a commitment to Senator Simpson to work on legislation to safeguard individuals from similar privacy intrusions. (See Confirmation Hearings at 1372-74, 1674-77 (September 29, 1988).

On October 21, 1987, Representative Al McCandless introduced the Video Privacy Protection Act of 1987 to create a "federal protection from this kind of snooping" by preventing the unauthorized disclosure of a person's video rental history. Representative McCandless' early action sparked the work of others in the House and the Senate. The need to protect video rental lists was widely supported, but there was also a strong belief that the First Amendment and privacy concerns raised by the unauthorized disclosure of video rental lists necessitated expanding the bill to cover library borrower records.

On May 10, 1988, Senator Leahy introduced the Video and Library Privacy Protection of 1988, co-sponsored by Senators Simon, Grassley, and Simpson. On June 29, 1988, Representative Kastenmeier joined Representative McCandless in introducing an expanded version of the original House legislation.

The ACLU vigorously supports these bills. We believe, as does the majority of the American public, that privacy is an enduring and cherished value and that legislation is necessary to protect personal, sensitive information. A number of Harris surveys have documented the growing public demand for privacy legislation. In a 1983 analysis of their survey results, Louis Harris & Associates concluded:

> Particularly striking is the pervasiveness of support for tough new ground rules governing computers and other information technology. Americans are not willing to endure abuse or misuse of information, and they overwhelmingly support action to do something about it. This support permeates all subgroups in society and represents a mandate for initiatives in public policy. (Louis Harris, The Road after 1984: A Nationwide Survey of the Public and its Leaders on the New Technology and its Consequences for American Life, December, 1983).

The public's concern for their privacy rights dramatically increased during Judge Bork's confirmation hearings. In fact, the majority of Senators who voted against his confirmation cited their concern about the Judge's limited view of the Constitutional right to privacy. A broad-based, bi-partisan coalition pulled together shortly after the disclosure of the Bork family's video list to support remedial legislation to ensure such a thing could never happen again.

The immediate and sustained alarm that many experienced over the video list disclosure may be explained by our society's deeply cherished belief that the right to privacy is, as Justice Brandeis said, "the right to be let alone-- the most comprehensive of rights and the right most valued by civilized men." (Olmstead v. U.S., 277 U.S. 438 (1928), J. Brandeis dissenting). Our right to privacy is intimately tied to our sense of individual autonomy-- that when we are not committing a crime, we should be able to live our lives outside of the public eye. This is particularly true when our activities implicate both First Amendment and privacy values.

The First Amendment guarantees us our right to publish and receive ideas. The Fourth Amendment buttresses the right of citizens to read and acquire information free from governmental intrusion, a right essential to the free flow of information and intrinsic to a free and democratic society. The Supreme Court, in NAACP v. Alabama, 357 U.S. 449 (1958), recognized the severe chilling effect on First Amendment freedoms that can result from the unauthorized disclosure of one's personal, political beliefs. In addition, the Court declared in Stanley v. Georgia, 394 U.S. 557 (1969): "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch."

These precious rights have grown increasingly vulnerable with the growth of advanced information technology. The new technologies not only foster more intrusive data collection, but make possible increased demands for personal, sensitive information. Private commercial interests want personal information to better advertise their products. The government is interested in sensitive information to enhance political surveillance. And, the intelligence community may be looking at reading lists to protect our national security. The danger here is that a watched society is a conformist society, in which individuals are chilled in their pursuit of ideas and their willingness to experiment with ideas outside of the mainstream. Although Judge Bork recently joked about how embarrassed he is to have the world learn that he watches dull movies, imagine if his confirmation had been doomed by the revelation of more unsettling viewing habits.

New technologies enable people to receive and exchange ideas differently than they did at the time the Bill of Rights was drafted. Personal papers once stored in our homes are now held by others with whom we do business. Transactional information may be easily stored and accessed. Records of our reading and viewing histories are now maintained by libraries, and cable television and video companies. The computer makes possible the instant assembly of this information. .

The ACLU is concerned about the danger posed by the aggregation of separately compiled lists to create profiles on individuals. As Arthur Miller, author of Assault on Privacy, testified in 1971:

> Whenever an American travels on a commercial airline, reserves a room at one of the national hotel chains, rents a car, he [or she] is likely to leave distinctive electronic tracks in the memory of a computer that can tell a great deal about his [or her] activities, movements, habits and associations. Unfortunately, few people seem to appreciate the fact that modern technology is capable of monitoring, centralizing, and evaluating these electronic entries, no matter how numerous they may be, making credible the fear that many Americans have of a womb-to-tomb dossier on each of us. (Federal Data Banks, Computers and the Bill of Rights, Hearings Before the Subcommittee on Constitutional Rights, Committee on the Judiciary, 2/23/71, p. 9)

That same year, Alan Westin, in his book Data Banks in a Free Society, argued: "We have seen that most large-scale record systems in this country are not yet operating with rules about privacy, confidentiality, and due process that reflect the updated constitutional ideals and new social values that have been developing over the past decade." (p. 398). The Supreme Court, echoing these concerns in Whalen v. Ror 429 U.S. 589 (1977), recognized:

> the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files....The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty

> to avoid unwarranted disclosures. [We] recognize that in some instances that duty arguably has its roots in the Constitution.

The Supreme Court, however, has been reluctant to expand the scope of the Fourth Amendment to hold that the Constitutional right to be secure in one's paper's and effects should extend to personal information held by others. U.S. v. Miller, 425 U.S. 435 (1976). Fortunately, Congress has responded to this pressing need, acting quickly when First and Fourth Amendment rights have intersected to establish assertible privacy interests: in the press offices and files of newspapers (Privacy Protection Act of 1980, 42 U.S.C. 2000(a)(a)); in individual's cable viewing records (Cable Communications Policy Act, P.L. 98-549); and in electronic communications (Electronic Communications Privacy Act of 1984, 18 U.S.C. 2510). The Video and Library Privacy Protection Acts of 1988 are the most recent Congressional efforts to address the heart of an important First Amendment/privacy issue. If passed, the legislation will protect our freedom to think and inquire by creating a substantive zone of privacy around library and video records.

FEDERAL INFORMATION PRIVACY LEGISLATION

The protection of video and library records is consistent with the past 18 years of progress in the area of federal information privacy legislation.

In 1970, Congress passed the Fair Credit Reporting Act (15 U.S.C. § 1681) prohibiting credit and investigation reporting agencies that collect, store and sell information on consumers' credit worthiness from disclosing records to anyone other than authorized customers. The Act requires the agencies to make their records available to the record subject and provides procedures for correcting inaccurate information. The legislation created a legal framework in which the reporting companies could operate and was passed in response to the public's growing awareness and concern about personal information maintained by credit reporting bureaus.

Four years later, the Family Educational Rights and Privacy Act (20 U.S.C. § 1232(g)) was enacted, limiting disclosure of educational records to third parties. The law requires schools and colleges to grant students access to their records and mandates a challenge and correct procedure.

That same year, Congress passed landmark federal privacy legislation -- the Privacy Act of 1974 (5 U.S.C. § 552a)-- to control the collection, storage, use and dissemination of personal information maintained in federal agency record systems. The passage of the Act came on the heels of the Watergate scandal, which revealed to the public the extent of the government's surreptitious information gathering and use. The founding principles of the Act are derived from the recommended federal Code of Fair Information Practices developed by the Department of Health, Education and Welfare and published in Records, Computers and Rights of Citizens (1973). The major principles of the Code are: the government shall not maintain secret records; individuals must know what files are maintained on them and how they are used; individuals must be able to correct and update their files; and most importantly, information obtained for one purpose may not be used for a different purpose without the individual's consent. This last principle became the driving force behind the Privacy Act of 1974 and the legislation that followed.

The Privacy Act mandated the creation of the Privacy Protection Study Commission to make a "study of the data banks, automatic data processing programs, and information systems of governmental, regional and private organizations, in order to determine the standards and procedures in force for the protection of personal information." Based on its findings, the Commission was to recommend additional legislation necessary to protect individuals' personal privacy interests.

In its 1977 report, Personal Privacy in an Information Society, the Commission concluded that an effective national information policy must embody three major principles: minimize intrusiveness, maximize fairness and create legitimate, enforceable expectations of confidentiality. (pp. 13-21). The report outlined the need to protect a wide variety of records, including insurance, financial, telephone, employment, education, taxpayer and medical records. As a general rule, the Commission recommended, organizations that maintain a confidential record must be placed under a legal duty not to disclose the record without the consent of the individual, except in certain limited circumstances, such as pursuant to a search warrant or subpoena. Even in such instances, the individual must have the right to challenge the court order before disclosure of the record. (pp. 362-63).

The Right to Financial Privacy Act of 1978 (12 U.S.C. 3401), a Congressional response to U.S. v. Miller and a direct outgrowth of the Privacy Commission's report, created an assertible privacy interest in personal financial records. The Act provides individuals with the right to a notice and challenge procedure with which investigative agencies must comply before records may be disclosed.

Congress passed the Privacy Protection Act of 1980 (42 U.S.C. § 2000(a)(a)) to prohibit the government from searching press offices if no one in the office is suspected of committing a crime.

In 1982, Congress passed the Debt Collection Act (P.L. 97-365) requiring federal agencies to provide individuals with due process protections before an individual's federal debt information may be referred to a private credit bureau.

The Cable Communications Policy Act (P.L. 98-549), enacted in 1984, prohibits a cable service from disclosing information about a subscriber's cable viewing habits without the individual's consent. The Act requires the service to inform the subscriber of the nature and use of information collected, and disclosures that may be made. The cable service must also provide subscribers access to information maintained on them.

Two years ago, Congress passed the Electronic Communications Privacy Act (18 U.S.C. § 2510). The Act amends the federal wiretap act to prohibit the unauthorized interception and disclosure of electronic communications made possible by new technologies, such as cellular phones, electronic mail and satellite television transmissions. The passage of ECPA was supported by a number of industry associations, partly due to concern about public confidence in using the new systems.

Legislation is currently pending to bring under the wing of the 1974 Privacy Act the computerized matching of personal information held in federal agency databases. For years, the computerized matching of records has grown outside the scope of government regulation and oversight. The legislation, the Computer Matching and Privacy Protection Act of 1988, passed the Senate last year by unanimous consent and was recently reported out of the House Government Operations Committee. The ACLU is optimistic that the legislation will pass, and that the gaping hole created by the misinterpretation and misapplication of the Privacy Act's routine use exemption will be partially covered.

The legislation before us today promises to be another positive Congressional response to the need for protections on personal, sensitive information.

CONCLUSION

The ACLU is hopeful that the Video and Library Privacy Protection Act will continue to garner broad, bi-partisan support. We look forward to continuing to work closely with you to ensure passage of this important and timely legislation.

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Mr. **Kastenmeier**. Thank you, Ms. Goldman.

Now we would like to call on Mr. Vans Stevenson.

Mr. **Stevenson**. Mr. Chairman, and members of the committee, I appreciate the invitation and opportunity to appear before you today.

I am Vans Stevenson, Director of Public Relations, Erol's, Inc. As many of you know, we are a suburban based Washington, DC, video sales and rental chain and we have 165 stores in eight States and the District of Columbia. In addition to speaking for my company, I am also appearing on behalf of the Video Software Dealers Association, which represents video retailers and distributors throughout the United States. Approximately 20,000 of the 30,000 video retailers in the United States are represented by VSDA.

We would like to commend you, Mr. Leahy, Mr. Simon, Mr. Kastenmeier and Mr. McCandless and your staffs for the hard work that you went through to put together this important legislation. We support both bills. We support H.R. 4947 and S. 2361, which would prohibit the disclosure of individual customer rental or sales records, except in very limited circumstances. In our view, rental and sales records are privileged matters between the retailer and the customer. That is the firm policy of VSDA and its members.

We also agree that there should be certain exceptions to the rule against disclosure of such records.

First, we feel that an exception is appropriate when it is necessary in the routine course of business, such as when a delinquent account may require the involvement of a collection agency.

Second, we believe that disclosure is warranted where provided pursuant to a legal court order for law enforcement purposes. However, this law enforcement exception should be limited; it should be available only when the law enforcement agency has sufficiently showed its necessity, and when the customer is given notice and afforded an opportunity to appear and contest such an order.

As for requests made in the context of civil litigation, we recommend the approach in H.R. 4947. Disclosure should not be permitted.

Third, disclosure should also be allowed when a customer has clearly expressed written, informed consent. This could be either when the customer fully understands the exact circumstances in which the records are being requested, or when the customer's name and address will merely be disclosed as part of a general mailing list. We agree that this mailing list exception should not be used if the subject matter of a customer's rental would be indirectly revealed.

Erol's, my company, which is the nation's largest volume specialty retailer, has had a policy for a number of years prohibiting individual account disclosure. Any Erol's employee who violates that policy faces disciplinary action which could include immediate termination. Fortunately, we have never had to dismiss an employee for violating the policy.

In addition to strengthening our existing policy, it is our expectation that your committees will provide both courts and video retailers with guidance in the legislative history as to what kinds of actions retailers might take to safeguard the privacy of video records, so that they may avoid being unreasonably burdened by the legislation.

The Committee report can provide such guidance. We feel strongly that a video dealer should not be unfairly held liable for the unauthorized acts of an employee which are in clear violation of a strong and enforced store policy against such authorized disclosure.

The legislation is needed. I am aware of at least three instances when Erol's has received direct inquiries about individual accounts. Two were from Government agencies, and one from an attorney representing a client in a divorce proceeding.

1. A United States Secret Service agent asked if we could release information about an individual suspected of passing counterfeit currency. We refused unless ordered by a court of law. We never received such an order or a further inquiry.

2. An investigator from the United States Department of Housing and Urban Development requested account information regarding a Government employee suspected of using a Government vehicle for personal use during work hours. The HUD official said he suspected the employee was checking out tapes at one of our stores during working hours. We refused the request for information. There was never any followup call.

3. An attorney in a divorce proceeding requested the rental records of the defendant in the case. We refused. A subpoena was threatened but never served.

Mr. LEAHY. Did the attorney give any reason of why that would be valid, of what his reason was for wanting it?

Mr. STEVENSON. He never gave me any reason. He asked if the individual was a member, which we don't disclose either, and, number two, if the record was available. I asked him why and he didn't really make any comment and he said I will be back to you. and we haven't heard anything.

Mr. LEAHY. Thank you.

Thank you, Mr. Chairman.

Mr. STEVENSON. Let me review several other instances that we are aware of, and this is from around the country.

An attempt by the attorney for a spouse in a divorce proceeding to show, through video records that the other spouse was an unfit parent. The records were refused.

A subpoena served by the attorney of one defendant in criminal prosecution who sought the video records of is client's co-defendants. The store did not comply with the subpoena. The attorney did not pursue the matter and the co-defendants were acquitted.

A law enforcement agency subpoena seeking from a video store the video records of all of its customers, in the context of a question about local community standards for an obscenity prosecution. Here again, the records were refused and the subpoena was not passed.

Record sought by a defendant in a civil child molestation case, who sought to show that plaintiffs themselves had stimulated the children's fantasies by virtue of the movies shown in the home.

As you have pointed out, there have been attempts reported in the press to obtain the video records of public figures, such as Government officials.

These incidents suffice to put the Congress on notice about this serious potential for invasion of privacy and chilling of the exercise of the First Amendment right to view films free from fear of harassment or adverse publicity. Many State and local laws do not provide adequate protection. Congress should act.

While the attempts to obtain customer records were successfully rebuffed in the instances I have referred to, there is always the threat of efforts to judicially enforce subpoenas seeking disclosure. Home video dealers should not have to face potential liability for failure to comply with a subpoena, on the one hand, or lawsuits by their customers because they have complied, on the other hand.

Because we feel strongly about protecting the privacy of our customers and upholding the law, we are also concerned about consistency between Federal and State legislation currently in effect. As video dealers, we would like clear guidance as to which legal requirement would apply in case of conflicting standards.

We applaud the proposed bills to formally protect a reasonable right of privacy for the video customer. We believe that the legislation will help to strengthen our company's policy as well as similar policies practiced by the other video retailers in VSDA.

Thank you again, Mr. Chairman and members of the committee for the opportunity to speak to you today on behalf of both Erol's, Inc., and the Video Software Dealers Association.

I will be pleased to answer any questions you may have.

Mr. **Kastenmeier**. Thank you very much, Mr. Stevenson.

[The statement of Mr. Stevenson follows:]

SUMMARY OF

TESTIMONY OF VANS STEVENSON
FOR THE
VIDEO SOFTWARE DEALERS ASSOCIATION AND EROL'S, INC.

ON

HOME VIDEO RECORD PRIVACY LEGISLATION

August 3, 1988

SUMMARY

The Video Software Dealers Association is the largest national trade association for retail home video dealers and video distributors. Its members operate some 20,000 of the 30,000 home video retail outlets in the country.

EROL'S, Inc., is a suburban Washington, D.C.-based video sale and rental retail chain with 165 stores in nine states and the District of Columbia.

VSDA and its members, including EROL'S, believe that the privacy of their customers' video records should be respected and preserved, except for very narrowly drawn statutory exemptions. That is VSDA's policy and we generally support legislative efforts to reinforce that policy, including the two bills before your subcommittees.

We agree that there should be carefully drawn exceptions for disclosure in the case of customer consent, ordinary business practice, or a strong showing that it is essential in a law enforcement proceeding.

It is our understanding that your committees will provide some guidance to the courts and to video retailers regarding the steps that retailers might take to safeguard record privacy.

The pattern of requests for records, through subpoenas in criminal or civil proceedings and from journalistic inquiries, indicates the need for Congressional action. The trend toward increased efforts at disclosure puts Congress on notice about the serious potential for invasion of privacy and chilling of the exercise of First Amendment rights.

Video dealers should not have to face potential liability for failure to comply with a subpoena, on the one hand, or lawsuits brought by customers because they have complied, on the other.

The proposed legislation will strengthen the policy practiced by VSDA dealers of maintaining customer privacy, and thereby protect the free exercise of First Amendment rights.

TESTIMONY OF VANS STEVENSON
FOR THE
VIDEO SOFTWARE DEALERS ASSOCIATION AND EROL'S, INC.

BEFORE

THE COMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE
JUDICIARY COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

AND

THE SUBCOMMITTEE ON TECHNOLOGY AND THE LAW
JUDICIARY COMMITTEE
U.S. SENATE

ON

HOME VIDEO RECORD PRIVACY LEGISLATION

August 3, 1988

H.R. 4947
VIDEO PRIVACY PROTECTION ACT

DRAFT TESTIMONY

Mr. Chairman and Members of the Committee, thank you for the invitation and opportunity to appear before you today. My name is Vans Stevenson. I am Director of Public Relations for EROL'S, Inc., a suburban Washington, D.C.-based video sale and rental retail chain with 165 stores in nine states and the District of Columbia. In addition to speaking for my company, I am also appearing on behalf of the Video Software Dealers' Association, which represents video retailers and distributors throughout the United States. Approximately 20,000 of the 30,000 video retailers in the United States are represented by VSDA.

We support H.R. 4947 and S. 2361, which would prohibit the disclosure of individual customer rental or sales records, except in very limited circumstances. In our view, rental and sales records are privileged matters between the retailer and the customer. That is the firm policy of VSDA and its members.

We also agree that there should be certain exceptions to the rule against disclosure of such records.

First, we feel that an exception is appropriate when it is necessary in the routine course of business, such as when a delinquent account may require the involvement of a collection agency.

Second, we believe that disclosure is warranted where provided pursuant to a legal court order for law enforcement purposes. However, this law enforcement exception should be limited; it should be available only when the law enforcement agency has sufficiently showed its necessity, and when the customer is given notice and afforded an opportunity to appear and contest such an order.

A potential problem in the bill's exception for criminal law enforcement lies in the bill's requirement that the user be "given notice and afforded an opportunity to appear and contest such order." See § 2710(d)(1)(A). The bill does not designate who is responsible for giving the notice to the customer. It is important that the law enforcement agency have that responsibility so that the dealer does not become involved in any conflict between the user's privacy rights and the law enforcement agency's alleged need for disclosure.

As for requests made in the context of civil litigation, we recommend the approach in H.R. 4947. Disclosure should not be permitted.

Third, disclosure should also be allowed when a customer has clearly expressed written, informed consent. This could be either when the customer fully understands the exact circumstances in which the records are being requested, or when the customer's name and address will merely be disclosed as part of a general mailing list. We agree that this mailing list exception should not be used if the subject matter of a customer's rental would be indirectly revealed.

EROL'S, which is the nation's largest volume specialty retailer, has had a policy for a number of years prohibiting individual account disclosure. Any EROL'S employee who violates that policy faces disciplinary action which could include immediate termination. We have never had to dismiss an employee for violating the policy.

In addition to strengthening our existing policy, it is our expectation that your committees will provide both courts and video retailers with guidance in the legislative history as to what kinds of actions retailers might take to safeguard the privacy of video records, so that they may avoid being unreasonably burdened by the legislation. The Committee Report can provide such guidance. We feel strongly that a video dealer should not be unfairly held liable for the unauthorized acts of an employee which are in clear violation of a strong and enforced store policy against such authorized disclosure.

The legislation is needed. I am aware of at least three instances when EROL'S has received direct inquiries about individual accounts. Two were from government agencies, and one from an attorney representing a client in a divorce proceeding.

1. A United States Secret Service agent asked if we could release information about an individual suspected of passing counterfeit currency. We refused unless ordered by a court of law. We never received such an order or a further inquiry.

2. An investigator from the United States Department of Housing and Urban Development requested account information regarding a government employee suspected of using a government vehicle for personal use during work hours. The HUD official said he suspected the employee was checking out tapes at one of our stores during working hours. We refused the request for information.

3. An attorney in a divorce proceeding requested the rental records of the defendant in the case. We refused. A subpoena was threatened but never served.

Other home video retail businesses have encountered similar inquiries. These instances of efforts to obtain video store records include:

- An attempt by the attorney for a spouse in a divorce proceeding to show, through video records that the other spouse was an unfit parent. The records were refused.

- A subpoena served by the attorney of one defendant in criminal prosecution who sought the video records of his client's co-defendants. The store did not comply with the subpoena. The attorney did not pursue the matter and the co-defendants were acquitted.
- A law enforcement agency subpoena seeking from a video store the video records of all of its customers, in the context of a question about local community standards for an obscenity prosecution. Here again, the records were refused and the subpoena was not pressed.
- Records sought by a defendant in a civil child molestation case, who sought to show that plaintiffs themselves had stimulated the childrens' fantasies by virtue of the movies shown in the home.

There have also been attempts reported in the press to obtain the video records of public figures, such as government officials.

These incidents suffice to put the Congress on notice about this serious potential for invasion of privacy and chilling of the exercise of the first amendment right to view films free from fear of harassment or adverse publicity.

Many state and local laws do not provide adequate protection. Congress should act.

While the attempts to obtain customer records were successfully rebuffed in the instances I have referred to, there is always the threat of efforts to judically enforce subpoenas seeking disclosure. Home video dealers should not have to face potential liability for failure to comply with a subpoena, on the one hand, or lawsuits by their customers because they have complied, on the other hand.

Because we feel strongly about protecting the privacy of our customers and upholding the law, we are also concerned about consistency between federal and state legislation currently in effect. As video dealers, we would like clear guidance as to which legal requirement would apply in case of conflicting standards.

We applaud the proposed bills to formally protect a reasonable right of privacy for the video customer. We believe that the legislation will help to strengthen our company's policy as well as similar policies practiced by the other video retailers in VSDA.

Thank you again, Mr. Chairman and Members of the Committee for the opportunity to speak to you today on behalf of both EROL'S, Inc. and the Video Software Dealers Association.

I will be pleased to answer any questions you may have.

Mr. **Kastenmeier**. Mr. Richard Barton.

Mr. **Barton**. Mr. Chairman, and I——

Mr. **Kastenmeier**. Incidentally, without objection, your statements collectively will appear in their entirety as submitted to the committee, even if you have summarized your remarks.

Mr. **Barton** [continuing]. Mr. Chairman, and members of the two subcommittees, it is real pleasure to be here today. I hope I can say this after the testimony, since you know, I am going to take a little bit different tack than the other witnesses here.

Before I begin, I would like the indulgence of the subcommittee to introduce a very prominent person in our industry, Alexander Hoffman, who is sitting right over here. He is the recently retired group vice-president of Doubleday, Incorporated and former Chairman of the Direct Marketing Association. He was one of the spearheads of the Direct Marketing Association's activities in the privacy area in connection with the Privacy Protection Study Commission, and afterwards, which I think dramatizes that we are very concerned about the privacy issues raised here and about the general concerns of the American public in privacy.

We want to cooperate with the subcommittees, and we have been working with the staffs. We are very concerned about the privacy issues that have been raised here by the other three witnesses, and we agree that the specific instances which they cite in most cases are things that should be prevented either by law or certainly by practice within their industries.

We do not agree that Judge Bork's personal preferences for video tapes should have been released. We do not agree that specific titles and reading habits of specific individuals should be released from libraries. But this bill, we believe, goes far beyond remedying the ills which gave rise to the original bills.

The language of the two bills would actually have a significant impact on what heretofore has been considered the completely legitimate and accepted marketing practice of a major segment of American industry. That is the direct marking industry. We believe that the bills misunderstand or really don't address the question of how mailing lists are used and how mailing lists are put together, in fact, even physically what mailing lists are.

Mailing lists as such do not contain specific data about specific individuals. They are lists, they are aggregates of people, usually on computer tape which we don't even see who may have common characteristics such as income, buying patterns, places where they live, life style and what is important here for the subject matter of this hearing, either vocational or avocational interests which indicate that they might be receptive to receiving a specific offer or contributing to a specific charity or for that matter supporting of specific political candidate.

Companies, we agree, do have the knowledge of specific buying habits of their customers in the same way that Erol's does and the same way libraries do, but this is not translated onto a mailing list. The only physical manifestation that comes out of the mailing lists is a piece of paper with a name and address on it that goes on an envelope or a catalog.

There is no specific information which is given out by a mailing list. To make an important point, there is no complaint that I know of, at least in the history of the Direct Marketing Association involvement in issues like this, that specific information about specific individuals has been given out from the mailing lists and for mailings.

In 1977 the Privacy Protection Study Commission which was cited by the ACLU favorably, maybe not this part of it, but other parts, agreed with the industry, the compilation and use of mailing lists did not invade anyone's privacy and should not be legislated against.

But even before the Privacy Protection Study Commission, in 1971, the Direct Marketing Association realizing people's growing concerns about privacy, developed an industry-wide mail preference service, administered even to this day by the Direct Marketing Association to allow people to get off mailing lists.

We have advertised that program very, very broadly throughout the country with hundreds of millions of impressions of advertisements in magazines and newspapers and dealing with people like Action Line editors and consumer groups.

It has been endorsed by organizations such as U.S. Office of Consumer Affairs and the National Council of Better Business Bureaus. We also began at that time another successful program to insist that companies which rent their lists give the customers an opportunity to have their names deleted.

We believe fervently in that principle and that is recognized in the two bills that are being considered before us today. So we do believe that people should have the opportunity to get off of a mailing list. We promote that nationally. But we do not believe that mailing lists and the use of mailing lists per se is a violation of anyone's privacy rights. There is some specific language I would like to approach in both bills that gave us great difficulty.

First, the current language in both, I believe, prohibits any disclosure which would directly or indirectly disclose the character of the video tape rented. As I said before, it has generally been understood that there is no harm in the commercial use of the character of the material rented on a mailing list.

It doesn't invade somebody's privacy to put the person on a mailing list because he may have or she may have rented classic westerns or video tapes about workouts or whatever. Pick a subject. Especially when the individual has the power to stop such rental if he or she chooses.

If he ran a golf video club list or a sailing list, you can make a fairly safe assumption that that person on the list has interests in those specific matters. We think it is legitimate to market to these people, but the effect of this legislation would be to prohibit the use of these lists unless affirmative consent of the consumer is obtained, which frankly is tantamount to prohibition ~~for use of these~~ lists.

Therefore, under the proposed legislation a general list can be rented, but a list that indicates their interests, at least as far as video tapes are concerned, can't or at least practically can't be. As I said, it has been generally established that there is very—no real privacy interest in renting the names of customers and their general interests.

Finally, we are concerned with the requirement in the House bill which requires a person to check a yes box and return it to the direct marketing company before his name be—may appear on the list. We are in the business of marketing our products and services.

Studies have shown that non-sales related information in separate notices and things of that nature significantly decreases response. It is not that we don't want to do this. We will do it and we have included in our testimony, many, many examples of many companies, public interest organizations such as consumers union and the American Express, which is mentioned here, which give people this opportunity.

But the Privacy Protection Study Commission itself recognized there is a great deal of diversity in the direct marketing business and there is—there should be flexibility in how we provide the notice. We would like that kind of flexibility.

In closing, I think that just two thoughts here, three thoughts, I guess. One is we do think that this bill should be limited to the evils which everybody described, which deal with libraries and in this specific case revealing of information from the rental of video tapes from retail stores.

Secondly, we do not believe that the simple existence of a mailing list and mailing to customers because of particular interests they may have violates privacy. And, third, we would like to have the flexibility within the context of the bill in order to be able to rent our specialty lists. We want to sincerely and strongly thank the two subcommittees for hearing this testimony, and we are looking forward to working with you in the future, as we have in the past on issues of great concern to us all.

Thank you.

Mr. **Kastenmeier**. Thank you very much, Mr. Barton. Your remarks conclude the prepared testimony.

[The statement of Mr. Barton follows:]

Before the

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE

and

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON TECHNOLOGY AND THE LAW

TESTIMONY OF

RICHARD A. BARTON
Senior Vice President
Government Affairs
DIRECT MARKETING ASSOCIATION

August 3, 1988

Contact: Richard Barton
(202) 347-1222

Ronald Plesser
(202) 861-3969

SUMMARY OF TESTIMONY OF RICHARD A. BARTON

The Direct Marketing Association ("DMA") has been carefully following the Video and Library Privacy Protection Act of 1988 and agree that the public disclosure of Robert Bork's video rental choices should not have been made. It is our hope that we can support a legislative remedy to that problem. However, it is with much regret that I have to say that given its current coverage of direct marketing, DMA and its members will have to oppose this legislation.

The direct marketing industry shares this committee's concern that personal privacy be protected in the use of video customer information lists and pledges that our industry will continue its successful seventeen year effort to further the privacy interests of our customers. DMA started its privacy efforts in 1972 and has spent much time, money and effort to inform the public of its mail preference system. We believe that as the result of these efforts and the notices placed in consumer material by most marketers that the public is aware of its ability to restrict the use of names for marketing purposes.

In summary, we contend, however, in the context of video that this legislation should be limited to retail rental establishments. Further, we believe that any person renting or exchanging a mailing list should be able to describe the character or the nature of the video rented, e.g. sports video as long as the customer is given the opportunity to object to the sale or exchange of the customer's name.

97

TESTIMONY

Good morning, my name is Richard A. Barton, and I am Senior Vice President of the Direct Marketing Association responsible for government relations. DMA has been carefully following the Video and Library Privacy Protection Act of 1988 and agree that the public disclosure of Judge Robert Bork's video rental choices should not have been made. It is our hope that we can support a legislative remedy to that problem. However, it is with much regret that I have to say that given its current coverage of direct marketing, DMA and its members will have to oppose this legislation.

As currently drafted, this legislation adversely affects the direct marketer's most important business asset: the mailing list. There is no evidence that direct marketing companies have done what was done to Judge Bork or anything else adverse to its customers. We do not publicly disclose information about what a person buys. We have a 17-year-old system in place whereby customers may have their names removed from our lists. I will discuss this system in a moment. We do not feel that our legitimate commercial activities need to be regulated by a bill whose purpose it is to protect consumers from an abuse which we have not committed.

The direct marketing industry shares this committee's concern that personal privacy be protected in the use of video customer information and pledges that our industry will continue its successful seventeen year effort to further the privacy interests of our customers. DMA started its privacy efforts in 1972 and has spent much time, money and effort to inform the public of its mail preference system. We believe that as the result of these efforts and the notices placed in consumer material by most marketers that the public is aware of its ability to restrict the use of names for marketing purposes. This process of name removal or Mail Preference Service ("MPS") has been endorsed by the President's Office of Consumer Affairs, the Better Business Bureau and consumer officials in many states. Most of our members have their own MPS services. Examples of how these companies notify their customers of how to have their names removed from lists are attached to my testimony.

In summary, we contend, however, in the context of video, that this legislation should be limited to retail rental establishments. Further, we believe that any person renting or exchanging a mailing list should be able to describe the character or the nature of the video rented, e.g. sports video as long as the customer is given the opportunity to object to the exchange or rental of the customer's name.

DMA has nearly 3000 member firms nationwide which represent every functional level of industry -- manufacturing, wholesale and retail. These companies market goods and services through direct response methods, including direct mail advertising and mailing lists. As a measure of direct marketing's economic importance and consumer acceptance, consumer sales volume from catalogs alone are estimated to be in the tens of billions of dollars. The direct marketing industry makes a major economic impact through increased sales of goods and services. In addition, the direct marketing industry itself is a major contributor to increased employment.

Video tapes are emerging as a major element of the marketing business. The new traditional video tape version of movies are being sold through the mail as well as educational and instructional material. Everything from exercising to cooking to gardening to entertainment is finding its way onto videotape. A rapidly growing amount of all video tapes in the United States are sold directly to consumers through the mail.

Privacy is not a new concept to the direct marketing industry. We not only protect our customers against unauthorized disclosures, we give them an opportunity to restrict our members from renting or exchanging their names. Typically, a direct marketer as shown in the attached examples will notify its customers that mailing lists containing their names and addresses may be exchanged or rented and they are given the opportunity to limit or restrict such disclosure. In addition, through mail preference a consumer may contact DMA and we will distribute their names to any list marketer or broker who requests it, including members and non-members, who in return will eliminate those consumers names from any solicitations that they make.

Video mailing lists rented or exchanged do not contain a list of titles purchased. They simply state how many times an individual purchased through the mail in a preceding time period. In some instances the lists may indicate a subject preference, e.g. sports. There is no doubt that direct marketing companies, like retail stores, know what a customer has purchased. And there is no doubt that direct marketing companies use this information in an attempt to increase sales. Companies in our industry want to know about a person's interest to be better able to market products to that person. If you are a hiker, changes are you would be interested in a catalogue selling camping or fly fishing equipment. If you are a gardener, you might want to buy bulbs or seed. If you are a handyman, you might want to buy more tools. And if you watch videos at home on your VCR, you might want to buy more videos...or home electronics...or books. These lists are closely controlled and they are used only for marketing purpose. They cannot be accessed over the counter and are maintained with a high degree of security.

In contrast, a video store primarily rents video entertainment films. As a result they keep a more detailed record of an individual to protect themselves in case the customer does not return the videos. It was these rental records which were released for non-marketing purposes in Mr. Bork's case.

In terms of unauthorized access to the name and habits of our customers, we simply are unaware of any instance, even an isolated one, where a name of a direct market consumer has found its way any place except onto a mailing label back to consumers. We do not believe that this practice of list rental and exchange raises privacy issues. Others after looking at this issue including the U.S. Privacy Protection Study Commission have concluded that receiving mail in itself does not raise privacy concerns.

In July of 1977, some five years after we began our own effort, the United States Privacy Protection Study Commission issued the most comprehensive report ever done in this country on privacy. It studied the direct marketing industry extensively and concluded that:

> That a person engaged in interstate commerce who maintains a mailing list should not be required by law to remove an individual's name and address from such a list upon request of that individual, except as already provided by law.

The Commission went on to state however, that an organization should afford its customers the opportunity to restrict the use of their names. The Commission believed that a voluntary approach would be successful. We believe that our MPS system and those of our individual members have been very successful and that the direct marketing industry has protected its customers from the very abuses which prompted this legislation.

The proposed legislation covers direct marketers as well as retail stores on the theory that the disclosure of video tape selections is a practice that warrants legislative protection and if it is warranted for retail stores than the same restrictions should apply to anyone who distributes video tapes to consumers by other means. This we believe is bad privacy theory.

The Privacy Commission and subsequent legislative activities in the privacy arena all focus on the relationship between the record keeper and the subject of that record. Congress in 1984 as part of a cable reform package included a cable subscriber privacy section because of the concern that it had at that time with the developing central role of a cable company. Not only could a cable operator learn of you movie selections, it could discover when during the day or night you watched that movie. Congress acted on its concern that the cable operator was a new institution with no established track record of protecting consumer's privacy rights. Also, the cable industry sought the legislation.

More recently, in landmark legislation, both of these subcommittees passed the Electronic Communications Privacy Act. That statute recognizes the special role of remote computing services in our society and established very strong requirements concerning the release of information from such services. Also, the remote computing industry sought the legislation.

Here the video store industry has sought this legislation in light of the publicity resulting from the unauthorized disclosure of Judge Bork's records. The library community has also sought legislation because of the abuse of their libraries by law enforcement officials through library awareness programs.

In stark contrast, there is no record to support any legislative action directly affecting direct marketing. Given the industry's unblemished seventeen year history of compliance with privacy questions, we seriously question the need to legislate our business. We strongly request that we be given the continued opportunity to respond voluntarily to the challenge of privacy.

Moreover, this legislation is also too restrictive in terms of its limitation on the sale or rental of mailing lists where the individual has been notified that his or her name may be rented. The current language prohibits any disclosure which would directly or indirectly disclose the character of the video tape rented. We agree that this alternative consent procedure should not be used to disclose the specific titles rented. We do not see the harm in the commercial use of the character of the material rented. It does not invade someone's privacy to find out that he or she has rented classic movies or westerns, especially when the individual has the power to stop such disclosure if he or she chooses.

This indirect and direct language is also troubling where the list is a specialty list. If you rent a golf video club list or the sailing club video tape list, you can make a fairly safe assumption as to the character of the video tape rented. The effect of this legislation will to prohibit the use of these lists unless the affirmative consent of the customer is obtained, which is tantamount to a prohibition on the disclosure of such lists. Therefore, under the proposed legislation, a general list may be rented but a specialty list may not. We do not see the privacy interest in renting the name of customers and their general interest as long as they have been given the opportunity through alternative consent to stop disclosure of their names in the first place.

Finally, we are extremely concerned with the requirement in the House bill which requires a person to check a "yes" box and return it to the direct marketing company before his or her name may appear on a list. Direct marketing companies are doing just that...marketing products and/or services to consumers. Any card or notice which is to be filled out by a potential customer is very carefully designed to promote sales. Studies have shown that non-sales related information significantly decreases response.

This argument was made to the Privacy Commission some ten years ago and they too agreed that the direct marketing industry is very diverse and what may work in one context may not work in another. Therefore, the Privacy Commission recommended flexibility in how notice and opportunity are given. Requiring a box, is we believe, an unnecessarily specific requirement to be assured that a customer has been given adequate notice. We have attached many examples of mail preference notices and we believe that the variety of approaches demonstrated by those notices should be continued.

We also believe that our industry is the beneficiary of the First Amendment and the developing commercial free speech doctrines of the U.S. Constitution. We will not detail those arguments now, but simply state our interest for the record.

We continue to support the efforts of these Committees in connection with privacy and look forward to your continued work. Thank you for the opportunity to testify on these important issues.

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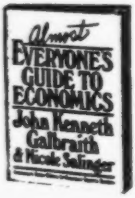

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Continued from page 126

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Of the 27 policies CU examined, our clear preference goes to the *Guardian NC75-A.* Its provisions uniformly met CU's criteria for top ranking, and while it was more expensive than many policies, its good features outweighed the cost differences, by our measures.

People for whom cost is most important should consider the fifth-ranked *Connecticut Mutual NC-83,* which did well on CU's quality measures and was below average in estimated cost.

People for whom cost is not an object may want to give serious consideration to the *Massachusetts Mutual DP 186,* or one of the Massachusetts Mutual policies not included in this project. The *DP 186* rated as high as the *Guardian NC75-A* in renewability and definition of disability, and some of the other Massachusetts Mutual policies incorporate as standard features many of the riders we consider useful.

The Consumers Union Foundation funded the research and writing of this report. For information about the foundation, write: Consumers Union Foundation, Box RC, 256 Washington St., Mount Vernon, N.Y. 10550

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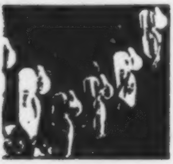

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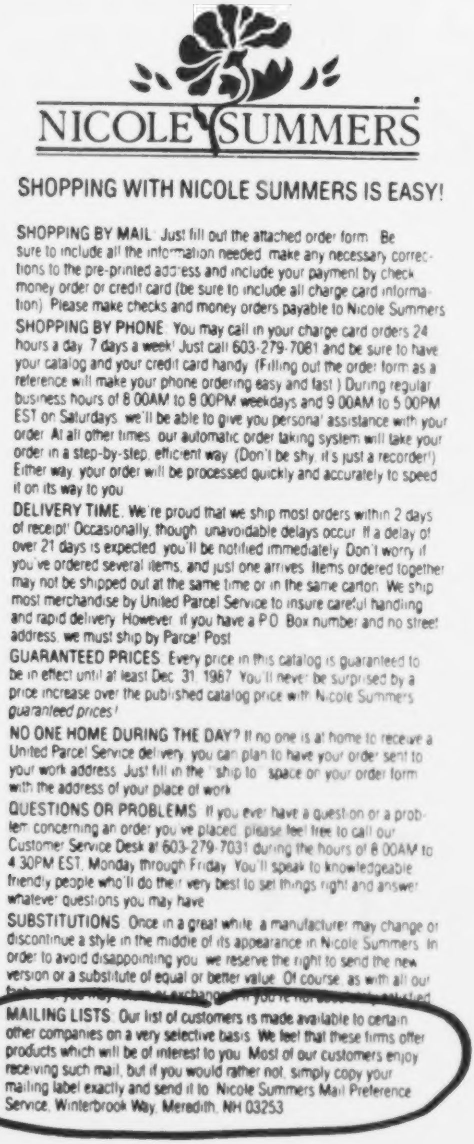

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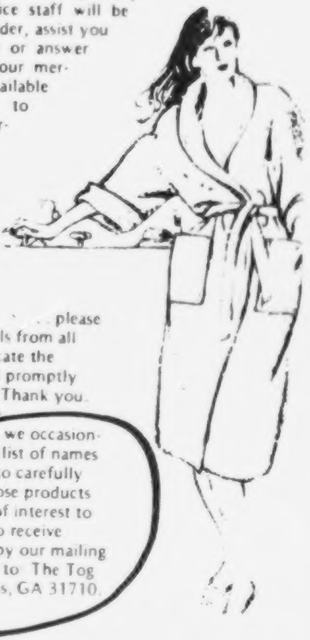

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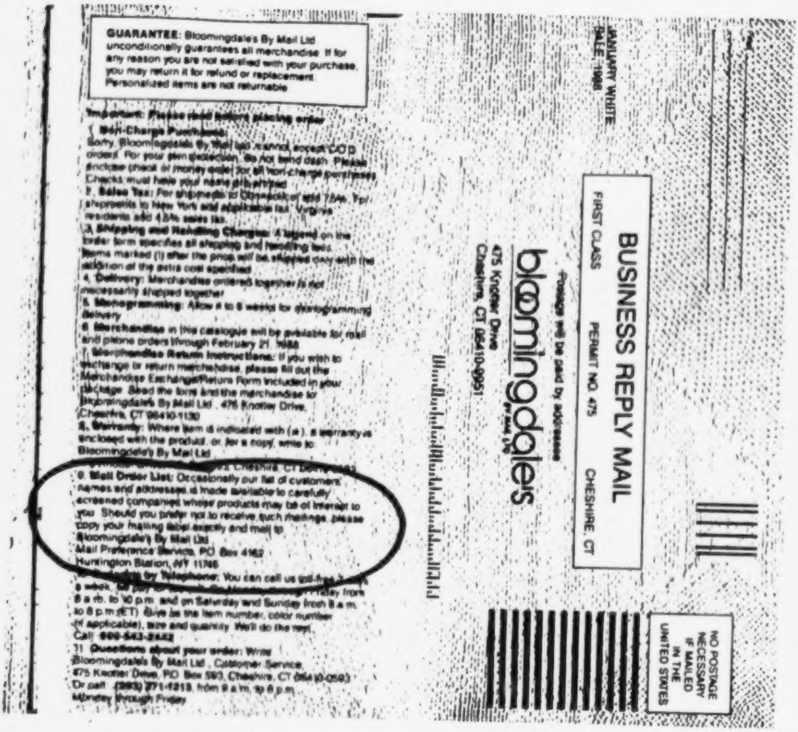

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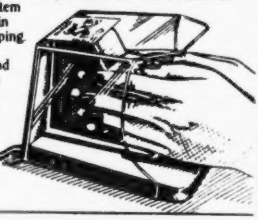

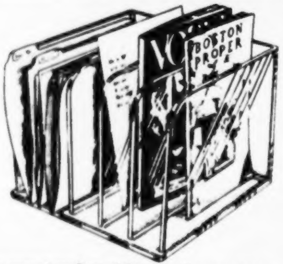

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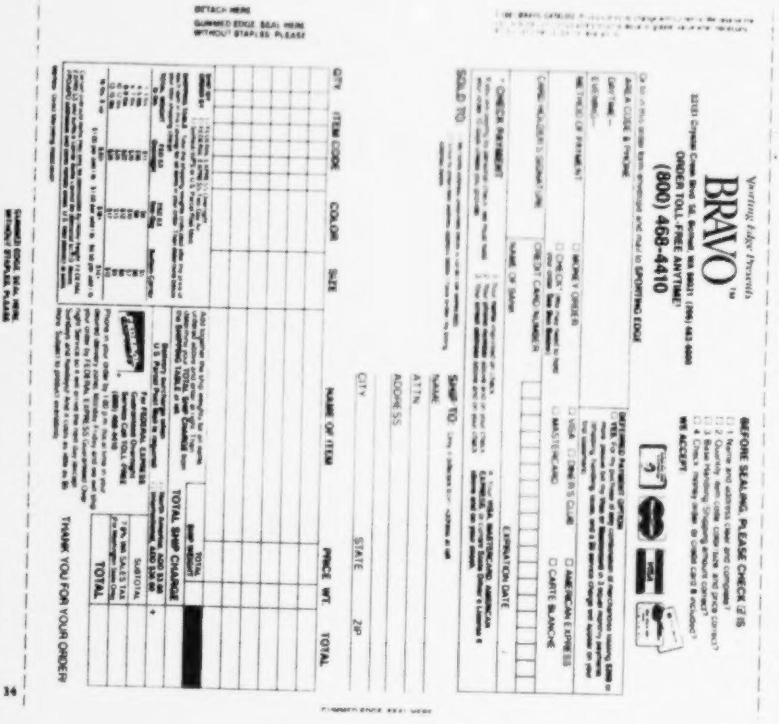

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14

Mr. **Kastenmeier.** I would now like to yield to the Senator from Vermont, Mr. Leahy.

Mr. **Leahy.** Thank you very much, Mr. Chairman.

Mr. Barton, let me ask you a couple questions, because I did talk about some of the basic premises and concerns that we share. We shouldn't be able to have just anybody come waltzing in and find out what you watch or what I watch or what your neighbors watch or don't watch. And I understand the interest you have in being able to develop indirect market techniques and mailing lists.

Let me give you an example of some of the things that concern me. I have three children. One is a young teen, who sent in for a manual on karate or kung fu or whatever all the kids were doing at that time.

It came to him. The label on it had something unique about it. I believe it had one letter off or something like that, but the thing came and it was an innocuous thing about how to teach yourself karate or whatever. He probably looked at it for 10 minutes in a typical kid's fashion and then threw it away to be forgotten. But what wasn't forgotten was the next 6 or 7 months.

I mean, I don't know what getting a karate manual triggers, but I couldn't believe the stuff that started coming to this teenager. It ranged from the Soldier of Fortune type ads to some of the most prurient lingerie things I have ever seen. There were ads for X-rated books, videos, and something that came very close to how to kill your neighbor. And I'm serious, it seems to have triggered all of these things.

You know, it wasn't ads from "Sports Illustrated" or "Fish and Game Weekly" or something like that. I mean, these are wild sorts of things. We finally came to the point where my wife and I kept going down to the Postmaster and just kept bringing these things and filing that little form to take your name off the list, which was semi-effective.

We still get them. Not as many, probably only because we have changed our address and some of them have finally stopped.

Now, you said that you don't object to limiting the disclosure of specific titles of videos. But you disagree with limiting the disclosure of the subject matter of videos.

That is where I have a problem. What triggers from that subject matter? We are talking more and more sophistication with computers and with profiles of people. And politicians do this, too, on profiles of voters and everything else. But how much should we be allowed to profile somebody?

What does it trigger to someone, if I watch old westerns, or if I watch only comedies or whatever? Should I really have to think that somewhere, somebody is building up a profile on me based on my personal habits, when I have no control over it? Wouldn't it make far more sense to say if I want them to do it, let me affirmatively ask to be put on a list. Not the other way around, that I am going to be on that list unless I think enough to ask for my name to be taken off?

Really, I have this vision of big brother, where somebody sits at a massive computer—somebody whom I have never seen, never will meet in my life—but that person can kind of figure out that Patrick Leahy is this sort of person based on what he reads or what he thinks or what he views and, therefore, he gets pegged a certain way and we are now going to bring whatever the marketing tools are available against him.

Do you see my concern?

Mr. **Barton**. It is a very very broad question.

Mr. **Leahy**. You don't have to answer yes or no.

Mr. **Barton**. I understand exactly what you are talking about. Your comments go way beyond what I consider privacy issues. They go into the whole issue of the amounts of mail you get, the types of mail you get, whether you are comfortable with it, whether you like it and also the vague or maybe more specific feeling as time goes on that there is somebody out there who knows a tremendous amount about you. You are uncomfortable about it, and I would be, too.

In the specific instance you used, and I have no idea who karate clubs rent their list to, but I think you gave us a pretty good example.

Mr. **Leahy**. The worst part is they misdelivered it to our neighbors and they said, "you got some more of that mail." Thank you very much.

Mr. **Barton**. They must be Republicans. I would say first of all, even if it was uncomfortable and you didn't like it, your son's privacy itself was not being invaded because there was nobody sitting in these companies who knew that your son specifically had gotten a piece of pornographic literature or so forth.

His name exists on a huge computer tape and it is difficult or impossible to get Mr. Leahy's name, and yes, he did do this. It is just not done and often can't be done. Very difficult to do that. In the second case, in terms of the rental of an awful lot of lists, that is a subject that our industry is broaching. And I don't think you can legislate against receiving a lot of mail. But it is of concern.

The best I can say right now is the amount of mail you get and the number of lists you rent, and all that, is something which probably has to be handled through the marketplace because we think, as we get more sophisticated in being able to deliver messages to customers, that in fact that problem will be reduced.

In the case of mail you don't want to receive, such as pornographic mail, and that mail that you describe as you went down to the post office to get your names off the list. There is a mechanism to do that, which is somewhat effective, as you say. We get into a lot of difficulties and we would like to find out to protect people, too. The definition of obscenity and pornography and things of that nature are very difficult ones. That is not a direct answer to your question, but——

Mr. **Leahy**. Please understand, Mr. Barton, and I am sympathetic with your views, too. My parents had a business in Vermont that depended on advertising and I understand the concern. I realize how the marketplace works.

A lot of the mail you get and I get and—maybe you don't want to have to admit this—but a lot of us look at it and it goes in the wastebasket. The companies, of course, that do that have to figure how effective they can be. That is fine. And if they are not effective, they go out of business.

A lot of mail I get is ads. I might look at something and say this is a good idea and I will buy it and it proves a service to me. So, I don't object to that.

What I am objecting to is that somewhere a profile builds up of Patrick Leahy or Robert Bork. I am concerned that somewhere based on very direct personal choices on what we read, watch, and think, that somebody builds a profile that is nobody's business except ours and that somebody is able to go into that profile and determine who we are and what we are, based on what we have done in total privacy.

When we read a book, when we watch a video, that is something that should be our choice and our business and nobody else's in the country. That is what I am concerned about and that is why I worked hard on this legislation, so that somebody can't penetrate my privacy or Judge Bork's privacy or anybody else's privacy.

Mr. **Barton**. I understand that. And I think that we can probably work out some language in the subcommittee in which the kind of profiling you are concerned about can't be tapped into. Now, I don't believe and I probably will get many of my member companies to jump on me about this, I don't believe the kind of profile you are talking about truly exists as a result of renting various lists.

If you get a piece of mail from XYZ magazine, that probably has been a combination of several lists they have rented which indicates that the people they are sending to may have a certain income, certain interests and so forth.

You can't go into that mailing list and do a specific profile. There are sort of assumptions made when rentals are made in which that specific kind of information doesn't exist in a specific profile. Now, in an individual company, you have profiles of your customers as any retail company has.

Any time I charge to Woodward & Lothrop, Woodies knows everything I buy and my buying patterns. They can advertise to that if they so desire. They don't let people know what that profile is, and I think we can prevent that kind of information from being released, without preventing, within reasonable areas, without preventing a marketing company or a store, whatever it is, to be able to appeal to that person's interest.

Mr. **Leahy**. I think——

Mr. **Barton**. It is a very difficult issue.

Mr. **Leahy**. It is, and Mr. Barton, I respect your concerns, and I don't want to trample on free enterprise here, but this is one issue we are going to have to deal with. What happens with interactive television when, in the next generation we are going to be doing so much more by using telephone lines, and televisions to pay bills and buy food, and maybe run the lights in our houses. If somebody wants to spin out the Orwellian theory, you can have this view of knowing what time I leave the house, what time I come back, how much I get paid, when I get paid, whether I pay my bills on time or I am late on some others, what I like to eat, what I am entertaining and everything.

You know, it is almost like having somebody in the dark with binoculars sitting outside your house and it is a little bit chilling. You don't mean to say that we have reached that point, but these are the concerns that we have, and we will continue to work with you and the organization to tread our way through this.

Mr. **Barton**. We worked with you all 2, 3 years ago on the Cable Privacy Bill. There we were dealing with a new technology which had great potential. I think we worked at it from a direct marketing viewpoint. We worked out a satisfactory compromise in which we could use to a certain limited extent the list without revealing specific information.

I think we are sort of falteringly stepping towards, from our industry's viewpoint, what is an expanded approach on this.

Mr. **Leahy**. I appreciate your efforts in working that out. Thank you, Mr. Chairman.

Mr. **Kastenmeier**. The gentleman from North Carolina, Mr. Coble.

Mr. **Coble**. I thank the Chairman.

Ms. Goldman, do you disagree with the 1977 recommendations of the Privacy Commission, that direct marketing be left to voluntary compliance or to be more specific, the private industry police and regulate themselves.

Ms. **Goldman**. One of the things that the Commission said in 1977 is that direct marketers use a number of different methods and at that early stage it didn't really make sense for them to recommend legislation, but what the Privacy Commission did find (and I am reading from the Commission report), after looking at the mailing list operations, is that among the record-keeping organizations that maintain records about individuals, about whom they have a direct relationship, it is a common practice to allow names and addresses to be used without telling the individuals.

"The Commission finds no overwhelming societal justification for such a state of affairs" and in fact they opposed any organization allowing that kind of complete discretion in the rental use of the mailing lists. The Commission also said that with the increased technology they were very concerned about some of the more troubling potentials that we could realize from the use of the mailing lists.

The Commission did look at the issue, and they did express concern. They did stop short of recommending legislation in this area, but they did say that they were very concerned about the future in this area, and now, 10 or 11 years later, we see that things that they were concerned about have occurred and that now is the time to recommend legislation.

I don't know what they would do if they still existed to look at this issue. But they did raise the concern.

Mr. **Coble**. You want equal time, Mr. Barton?

Mr. **Barton**. We work with the ACLU on many issues and we generally agree. This one we don't agree on. In the first place, concerns have been expressed but not any specifics. I do not know of any specific case in 17 years that we have been involved in privacy programs that the kind of information we are talking about has been revealed.

I don't know of any and I would like to see a record on it. I think our industry's record has been almost unparalled in that area. Secondly——

Mr. **Coble**. Repeat what you just said.

Mr. **Barton**. No information of the type we have been talking about, to my knowledge, of specific information or profiles about specific individuals released to law enforcement agencies or newspaper reporters or anyone, for that matter. As far as I know, there is no record of that ever having happened.

And that is a strong statement to make, because I could be proven wrong, but I do not believe I am wrong. And, secondly, our response to these concerns has been to redouble the industry effort to explain privacy concerns to our customers and to really strongly encourage both our companies and our own association to allow people to get off of lists.

I think that that program has been very successful. Pick up most catalogs that you get and virtually every one of them, they have notices there that they will take you off our list. We will not run your name on any specific or general list, if you don't want us to. So I believe, first, that we have been successful in meeting the concerns of the privacy protection study situation, and secondly, in terms of mailing lists, I will emphasize that, that there hasn't been any evidence and in fact anyone's privacy that it has been violated.

Mr. **Coble**. I was going to get into evidence of abuse. If anybody has any information about that, I would be happy to hear it now, Mr. Chairman, or subsequently.

Mr. Stevenson, as a practical matter, are you or other colleagues of yours in your industry, as a policy matter, divulging information upon request?

Mr. **Stevenson**. No, we are not. And I guess I would like to point out, too, there is no pattern of abuse in the retail, on the retail side either. There are several instances that we are aware of, but if I go back over the last 7 years in the 100 million tapes that Erol's has rented, we have three instances of requests, that I am aware of, and we have never divulged information.

If someone calls us and says somebody is going to rent an apartment, can you give us some credit history? We won't even reveal if a person is a member of Erol's, because you have to be a member of the club, quite obviously, to rent tapes, as many of you know.

Mr. **Coble**. This question, Mr. Stevenson, is one—I am not interrogating. I am just asking out of curiosity.

Has public opinion over the Bork incident affected rentals significantly one way or the other? Can you tell that?

Mr. **Stevenson**. Well, since that—there are a lot of things that affect rentals, but our business is about 30 percent ahead of the same period last year, so it really hasn't affected it. We did have a handful of phone calls from people that were concerned, but it was insignificant out of 800,000 members.

Mr. **Coble**. Good to have the panel here.

No further questions, Mr. Chairman.

Mr. **Barton**. I mentioned as an aside, I think half that 30 percent in the business has been from my family.

Mr. **Kastenmeier**. The gentleman from California, Mr. Berman.

Mr. **Berman**. I know where the other half has been. I would like to ask the ACLU to explain a little bit what the concept of privacy from the ACLU point of view is. Is it a sense of the right to not have one's space invaded?

Is Senator Leahy's privacy invaded by all of that mail that is coming from groups that bought the Kung Fu mailing list?

Are my constituents' space invaded when they write me letters saying take me off your darned mailing list? Is their privacy right being invaded by that or is it the public disclosure of information about me, or the private disclosure to others that do not consent?

Give me a sense of what privacy right we are talking about here.

Ms. GOLDMAN. You touched on a number of issues that came up during this hearing. One is that the right to privacy is not just the right to be left alone, but it is the right to be able to live certain areas of our lives outside of the public eye.

Mr. BERMAN. Is the right to be left alone?

Ms. GOLDMAN. It is more than just that. It is the right to be left alone, but is also the right to be able to conduct certain areas of our lives outside of the public aye and to not feel as though people know things about us which we do not want them to know, particularly issues that we are dealing with here today that touch on the First Amendment.

What we have here are First Amendment protected materials, library records, video records and that goes to the heart of a First Amendment issue, about what we read, what movies we watch, how we think, what our preferences are, and I think that what Senator Leahy expressed is a common feeling among most citizens, which is that when you get a piece of mail, which is clearly targeted to you and targeted to your preferences, targeted to your likes and dislikes, you wonder, "who knows this about me?"

"Where did this information come from? Where is this list, who else has it?" When you don't know, it can be very disconcerting. So it is not really the receipt of the mail which is of such concern, but it is who knows this information about me. How can they target me so carefully? Even people in my office have raised these questions.

Someone came into my office a couple weeks ago and said, "How did the Association of Retired Persons know that I am about to turn 55? How did they know to send me this mailing and say it is time for me to join?"

Another person said, "How did they know my son made the dean's list and maybe I want to get him a credit card?"

Mr. BERMAN. And this gets to a privacy concern, as far as the ACLU is concerned.

Ms. GOLDMAN. Absolutely. It is not just the Bork incident, not just the unauthorized disclosure to the public of this information. It is the disclosure within the private sector from company to company, which is very disconcerting, and which raises the possibility that there could be that unauthorized disclosure.

Mr. Barton says that there has been no demonstrated abuse in history and that might be true and that is wonderful. So why shouldn't they, along with Erol's and the Video Dealers Association and library community support a strong piece of legislation, if it comports with what they are doing now?

If it buttresses the industry practice, that is absolutely wonderful. That is the strongest reason to join in supporting this.

Mr. BERMAN. That does raise a question which I was going to ask Mr. Barton in a moment. You say ACLU supports both bills allowing disclosure of the name and address of the patron, where such disclosure does not directly or indirectly reveal the title or content of the service used, and the individual has been given an opportunity to prohibit the disclosure. As I understand it, now, there is no general law that gives an individual a right to prohibit disclosure.

Ms. **Goldman**. That is right.

Mr. **Berman**. Mr. Barton attaches to his testimony, examples of what he presumably thinks are sincere efforts by his members to inform people of their right to have their name—not of perhaps the privilege that——

Mr. **Barton**. I would rather say privilege, but I understand what you are talking about.

Mr. **Berman**. Shifting for a second, why wouldn't you support as a general rule a law that says that before a mailing list can be exchanged or rented, that the people on that list have the right to have their name removed?

Mr. **Barton**. I don't know at this point whether or not we would support it. We may support it. We may not support it. We would have to look at the language and work it out.

Our general feeling is that our self-regulation has worked. It works well, and that you always run into a danger when you start putting this like that in legislation, you go way beyond what your original intent is.

A practice in the industry right now is to inform people of their right to get off lists and to provide them that opportunity. But there are many, many ways you can do that and I would have to look at the language of a bill like that carefully. The point I wanted to make is this bill does not comport with the way we do this now.

It puts many more restrictions on and it does it with no evidence at all of any violations of privacy.

Mr. **Berman**. I understand that. When you say we believe that any person renting or exchanging a mailing list should be able to describe the character or nature of the video rented, would you want the opportunity to purchase the mailing list of Erol's club members, a simple list of members, names and addresses?

Mr. **Barton**. Yes.

Mr. **Berman**. Erol, what is your policy with respect to people who want to do that?

Mr. **Stevenson**. We have never sold a mailing list at the present time.

Mr. **Berman**. Have you leased it or let other people look at it?

Mr. **Stevenson**. No.

Mr. **Berman**. What if a VCR manufacturer says I would like to know people in the Washington area who have tapes. We have a new advanced style that allows the unauthorized copying—no. We would like to see these.

Mr. **Stevenson**. At this point they can't. There has been some discussion within the company to consider selling the general mailing list itself of just members' names and addresses, but at this point we haven't. We don't, at—we haven't sold any lists at this point.

Mr. **Berman**. What if you just want the list of all people who have taken out "Desperately Seeking Susan," because one of the client members wants to peddle Madonna posters, and they are interested in that? I am wondering, Mr. Barton, if you think you should have a right to get a list of people who rented that movie.

Mr. **Barton**. Let me state this in both philosophical terms and practical terms. In philosophical terms, yes, because we really believe that getting that list doesn't reveal anything about anybody, because nobody looks at that list. It is a specific letter to a specific person.

From practical terms we recognize the concerns of that and we would not oppose a restriction on that.

Mr. **Berman**. A restriction on a specific title?

Mr. **Barton**. Yes.

Mr. **Berman**. You would oppose a restriction on anything which described the character or nature of the video rented. I guess I see the problem here as you can find a lot by asking a superficially general but in reality very narrow kind of question or seeking a very limited kind of thing. What if it is to purchase a list of people who are members not of Erol's, but of the Sex Video Club around the corner that has the barricaded, walled off sections for adult videos.

Mr. **Barton**. Well, if I could go—if I could say, yes, but also say I would say the same——

Mr. **Berman**. Yes, to what?

Mr. **Barton**. That we are not supporting pornography here.

Mr. **Berman**. God forbid, none of us are.

Mr. **Barton**. I believe you should be able to rent the list. I will explain why I use the word "rent" in a moment because almost nobody gives up their lists. That you should be able to rent names of people who are interested by virtue of their buying habits and patterns in specific types of products or general types of products. This does not violate anybody's privacy.

I think that people, for example, who sell sporting goods, sporting goods might be very interested in, and it violates nobody's privacy, renting "Sporting Life" or "Sports Illustrated" lists. I don't know whether those companies rent their lists, but I don't see an invasion of privacy there. I don't see Congressman Berman being able to take their list and going in and finding out that Richard Barton is a reader of "Sports Illustrated," and interested in sports.

The only physical manifestation of that piece of information is the mailing list label that goes to you as an individual. That is—it is very difficult to go in, almost impossible to go in and get a specific piece of information off of a mailing list, which is a big computer tape, about a specific person.

If we want to prohibit that, I say we don't do it now, but I think we can talk about that.

Mr. **Berman**. I have far exceeded my time. Thank you, Mr. Chairman.

Mr. **Kastenmeier**. The gentleman from Ohio, Mr. DeWine.

Mr. **DeWine**. Thank you, Mr. Chairman. Let me give you a hypothetical and see if you have a reaction to it.

Let's say you have a child custody case, or visitation case. The custodial parent alleges that the noncustodial parent, who has the 10-year-old child as a ritual, goes with the child, picks up an X-rated movie, pornography, goes back home and they consistently, every Friday night watch these movies.

The custodial parent further alleges that as a result of that, when the child comes back on Saturday or on Sunday, the child is upset. The child has nightmares, and that it is affecting the child. The matter is in dispute between the two parents. The judge, who is deciding the case, and is listening to a lot of different evidence, a lot of different testimony, decides that it is a relevant question.

He or she would like to know that fact. Am I correct that under this bill a judge in the State of Ohio or the State of Kentucky or California, could not issue an order to obtain those records?

Ms. **KRUG**. If it were library records, that is exactly what we would need—a judicial order.

Mr. **DEWINE**. Under this bill?

Ms. **KRUG**. Under these bills, both of them.

Mr. **DEWINE**. Where in the bill can that be done?

Ms. **GOLDMAN**. The House bill does not provide for the release of the information in a civil proceeding. The Senate bill does.

Mr. **DEWINE**. I am looking at the House bill, and it is my understanding that under it this could not be done, even if there has been a showing to an impartial judge that this is a relevant piece of information.

My reading of the House bill is that the only exception, and I will get into this in a minute, has to do with a criminal proceeding.

Ms. **GOLDMAN**. I think the distinction here is that where you have First Amendment protected information, you need a very high standard of protection such as we have here in the House bill, and that that information can be obtained by other means besides the release of information.

Mr. **DEWINE**. It would be your position then that my right of privacy that I checked out an X-rated movie is higher than the good of that particular child.

Ms. **GOLDMAN**. Not necessarily.

I think we support the House bill——

Mr. **DEWINE**. Not necessarily. That is an interesting answer.

Ms. **GOLDMAN** [continuing]. We support the House bill because it provides for a stronger position. But we also do support the Senate bill. That is something that we are open to talk about.

Mr. **DEWINE**. Do you think that is a problem, that there is no general exception in here that would allow a State court, and I have just given one example and there could be many, many reasons, to issue an order covering such information.

I mean there is no exception other than this criteria that appears on page 4. The court has to find by clear and convincing evidence that the user has engaged in criminal activity.

Ms. **GOLDMAN**. We do not have any problem with that. We do support the provision in the Senate bill.

Mr. **DEWINE**. Let me carry this another step further and just say that I also have a problem with the criminal aspect of this, and I think law enforcement will and I will be anxious to hear what they have to say about it.

But my understanding of the way the House bill is written today is that a grand jury conducting a legitimate investigation could not get any of the records that we are talking about, unless by clear and convincing evidence they can show that the user had been engaged in criminal activity.

In other words, it has to actually focus on the user and they must show by clear and convincing evidence, not beyond a reasonable doubt, but clear and convincing, that criminal activity has been conducted. I can envision cases where this type of information would be very useful to clear some people, for example, or very useful in a general investigation, when the person who checked out the book or the person who checked out the video was not the target of the investigation at all, and so I think that, Mr. Chairman, it is a certainly a well-intentioned bill.

I was as horrified as everyone else was, I think, by the Bork example. I think it creates a real problem. I think we can craft a bill that will protect in that type of circumstance, but I think the language here today frankly has some real, real problems.

Mr. **Berman**. Would the gentleman yield on that point?

Mr. **DeWine**. I would be more than happy to yield.

Mr. **Berman**. Also in the House bill, as it is restricted to criminal proceedings, it all turns on the question of the prosecutorial interest in obtaining this information.

What about, to the extent it is relevant, and for purposes of a fair trial, the defendant's right to make his case or impeach earlier testimony? Should there be something?

Mr. **DeWine**. That is an excellent point and I think the problem with the House language is that we are talking about the user.

We are focusing only on one individual and it could be that that type of information could be used as a defense, that there could be a third party involved, and you want to get that information in with the third party.

Mr. **Leahy**. Mr. Chairman.

Mr. **Kastenmeier**. The Senator from Vermont.

Mr. **Leahy**. If I can interject for a moment, they just called for another vote. I think there are going to be a series of them, so I will probably have to leave at this point, but, I spent 8½ years as a prosecutor and tried hundreds of felony cases and other cases personally.

I argued more cases over that period of time in the Vermont Supreme Court as well as the Federal Courts and Courts of Appeals. Also, incidentally, and this may sound terribly self-serving, but I had the highest conviction rate that any prosecutor ever had in this century, literally.

Actually, I argued more cases on appeal than all my predecessors for 180 years put together in that office. I never lost on one of those.

I can't think of a single instance where being able to subpoena records where somebody had checked out books—which would be mostly what would have been then—or tapes, could have any relevance in a trial that I might have had.

I had a variety of trials from bank robbery to murders, to environmental matters to embezzlement, to fraud, to blackmail. I can't think of a single instance where having these kind of lists would, one, help the investigation, and two, even if we had gotten them, would have been eligible for proof under any basis whatsoever.

Now, the Senate bill does have exceptions for civil discovery if there is some area where you have some kind of probative value, but I would suspect if I owned Erol's or owned any other video store, I wouldn't want to give up something like this unless there was a very specific court order where there had been the offer of proof and the usual steps that you have to take to get it.

I would want to be darn sure I had a court order in hand before I gave anything up just for my own protection. I suspect you would give that same advice to any store owner who called you. But I just, I suppose there may be something that I have overlooked somewhere in that experience that would say we should do it. I can't think of anything that would have proven anything.

Anyway, I pass that on for what it is worth. We do have civil discovery in the Senate bill.

Mr. **Kastenmeier**. The gentleman from Ohio.

Mr. **DeWine**. If I can reclaim my time, I think the problem, Mr. Chairman, is that the House Bill doesn't allow for that court order, there is no provision in there.

Like the Senator who spent many years in prosecution, I was involved in prosecution for 6½ years. The one thing I learned is that every case is different. You never know what the facts are going to be and they change all the time. Having come out of that system, I am very comfortable with allowing a judge to make the determination of whether or not there is reasonable grounds to issue a subpoena or whether or not there is a reason to get this basic information.

The problem with the House bill, Senator, is that it simply does not allow that to be done. It doesn't allow a judge to make that determination at all. Only under very, very, very narrow circumstances. So, I think it is a question of flexibility and we need to take care of that problem.

Mr. **Kastenmeier**. The Senator has had to leave to vote. I have one or two questions. The gentleman from Ohio points out that in fact there are differences between the House and Senate bills, slight differences, this being one, I think the gentleman from Ohio called attention to.

I would like to talk just a little bit about industry practices. Mr. Stevenson, obviously, the Bork case did not involve an Erol's Video Store because that would have been against your policy.

Mr. **Stevenson**. Yes.

Mr. **Kastenmeier**. And even though you speak for some 20,000 out of 30,000 potential stores, not only Erol's but other stores, there are not uniform industry practices in terms of these particular privacy concerns, I take it.

Mr. **Stevenson**. Well, I think that in terms of uniform industry practice really goes to retention of records. I mean, you have the majority of the video stores are small, one-owner operations, and there is everything from personal computers that hold records up to Erol's which has a main frame computer to the person that has, you know, a card file of members. And so in terms of the way records are kept and the way that people market to their members or check out tapes are all different, but I would say generally speaking because it is a rental business, there is a record of that customer and what he checked in or out, whether it is on computer or whether it is within that computer or on a card, because there has got to be some way to get that tape back if it doesn't come back.

In terms of protecting the privacy of those records, based on what I know about the VSDA members and our own practices, information is not being released. Mailing lists, I am sure, are being sold of general memberships of video clubs and that kind of thing, but beyond that, I am not aware of any.

Mr. **Kastenmeier.** Do you support passage of these bills before us?

Mr. **Stevenson.** Yes.

Mr. **Kastenmeier.** Having a uniform practice set down by statute would be preferable for the industry as a whole, you believe; is that not correct?

Mr. **Stevenson.** Yes.

Mr. **Kastenmeier.** As far as the libraries are concerned, since the library standards are really very protective, as you have recited, why is a bill on this subject necessary, Ms. Krug?

Ms. **Krug.** For the very reason that the examples in my written testimony and the few that I tried to provide exhibit. We are often asked to provide records, particularly circulation records, which identify what people are reading, what they are borrowing from libraries, for use in ways that we consider to be inappropriate and definitely are not the reason or the purpose for which those records are kept.

We also recommend that, because we view circulation records as housekeeping records, once the materials are returned to the libraries, that the personal identifiable information is expunged from the record. Many libraries are moving in this direction, so you don't have records that go back hundreds of years or even 5 or 6 years.

In other words, once the material is returned, we have it back and, therefore, the record of who took it out can be expunged. But it is very serious to have someone impute a motive to you because of what you read. There are people who believe, number 1, if you don't have anything to hide, then it is OK to make it public, which I consider to be violative of the essence of humanness.

Second, if you read in specific areas, such as gay literature, you automatically are homosexual. If you read about witchcraft and the occult, you are automatically involved in that arena. If you read materials about any subject, perhaps beyond the mainstream, you automatically acquire those characteristics. These kinds of charges can be very damaging to individuals, both personally and professionally.

It is one of the reasons that we think again it is nobody's business what you read, but your own. The gentleman from Ohio, Mr. DeWine, pointed out some other instances where he felt that the circulation records or these kinds of records may be appropriate.

The truth is, Mr. Chairman, we don't ask people to take a litmus test or even a test of what they read when they bring the books back. We don't ask them what uses are going to be made of these materials. When I was in high school, for instance, I used to take books out of the library so my boyfriend would have something to carry home. I didn't want him to go home empty-handed. I know, library materials are used for lots of reasons, that being one end of the spectrum. Therefore, we believe the use for which they are going to use these materials is a private activity and should be treated as such.

Mr. **Kastenmeier**. I would assume that it would make a lot more sense, rather than the libraries relying necessarily on association self-imposed standards with respect to privacy concerns, or indeed the differing State statutes in the 38 States and the District of Columbia, if there were a uniform statute on the question, that would be more helpful for libraries. Otherwise, they would have to conform to, in some cases, no laws at all, but rather to association, let's say regulations or practices, which may be perhaps more difficult to assert or would not have to be asserted if, in fact, there was an understanding of what a Federal law on the subject would provide with respect to this question.

Would you not agree with that?

Ms. **Krug**. We believe it would bring uniformity. It would cover the States that do not have such statutes. We believe it would be much easier to maintain the privacy and confidentiality of specific records if indeed there were a Federal statute.

Mr. **Kastenmeier**. Mr. Barton, you mentioned that you had negotiated successfully with respect to the Cable Deregulation Act, in terms of practices or access on the part of Direct Marketing Association, and cable operators, but doesn't the Act, as I understand it, prohibit cable operators from disclosing, indirectly or directly, programs or other services that the subscriber might sign for?

Isn't that really a more difficult, a stricter standard than that which the bill would call for?

Mr. **Barton**. We didn't think so at the time.

Our counsel back here, Ron Plesser, who worked on here, may be able to answer the question more authoritatively.

It does restrict our ability to rent cable lists more than I think we believe necessary at this time and more than we think necessary in the context of this bill. But the original proposal there was to prevent us from renting them at all.

At that time, we didn't really have a clear idea of what kind of information would be available and there was no question about the fact that when you went broadly into what the cable can do, particularly when it gets interactive and there are all sorts of personal transactions you can go on or that go on that you wouldn't want to know about.

Now, you are right, we can rent—the customer list of a cable company which right now is specific enough for us, but I don't believe we can rent if we break it down into HBO customers or whatever the specific channels are; isn't that correct?

Mr. **Plesser**. I think that basic level of service can be segmented, but it is also important to note that there are no special cable operators. Cable operators sell to geographic areas.

They are not selling for example, camping equipment, so that you can, by the mere fact of getting a list, identify the character of the video.

Mr. **Kastenmeier**. May I indicate to the stenographer that that is Ron Plesser who responded to that question. Is there a distinction to be made between video mail sales or rentals versus retail video store rentals or sales, with respect to access for marketing for sale or rental of lists? Is there a distinction to be made?

Mr. **Barton**. Yes and no. We would like, I think, as an industry, that no distinction be made but I think we recognize that what happened with Judge Bork and perhaps with other people is such a difficulty that we would back off on that. We would say that it would still be useful for us if we can go to Erol's and say, instead of renting your general customer list, we would like to know who is interested in sports and who is interested in this and that, but we recognize that the nature and form of the information Erol's has is easier to extract—we would not fight not being able to do that.

One step further is that the specific information that Erol's has which the people want is much more specific than we usually want to get in a rental list. Therefore, I think a valid distinction can be made in the law to limit this to the retail rental establishments. I think there is enough of a distinction and enough of a question of the immediacy of the information that is available and literally that can be gotten when you walk into a store and any clerk can punch it up, or at least in a sophisticated store, any clerk can punch it up on a screen, and I think from my personal viewpoint, and I believe from the association's, that is a legitimate distinction to allow to distinguish between retail and mail order.

Mr. **Stevenson**. One real quick thing I wanted to point out about our system. It would be virtually impossible to generate a list today of people that were interested in golfing tapes, for example, or any particular rental category, because we don't store the information that way. We don't segment it that way.

If I can take a minute, I will run through it. If you go into an Erol's store and check out tapes, that information remains in the computer until you bring them back at the store level. Once those tapes have been checked back in, that information is transmitted to our central computer facility in Springfield, held for 14 days, put on a disk and shipped out to a vault someplace.

I don't even know where it is, and stored. But to reconstruct, say, a customer that has been with us 2, 3, 4 years would almost be impossible. The only reason the information has been retained is because Erol Onaran, who owns the company, at one time thought in the future we might be able to market directly to individuals at the store level, where if somebody checked out a certain number of times, you might suggest movies they haven't rented before at the point of transaction.

That is the only reason. We haven't kept them for any other reason, nor do we segment.

Mr. **Kastenmeier**. Erol's is not, I take it, and I ask only for my own information, involved in a mail order business in addition to your retail outlets?

Mr. **Stevenson**. We get involved in mail order from time to time through our magazine that we publish once a month, but as a practical matter, no.

Mr. **Kastenmeier**. Does the prohibition against a video service provider retaining its records for more than one year, is that or would that be a problem for Erol's or any other dealer?

Mr. **Stevenson**. In terms of being able to retain——

Mr. **Kastenmeier**. Yes.

Mr. Stevenson. To comply. No, I don't think the way the bill is written, no.

Mr. Kastenmeier. Thank you.

Are there further questions of my colleagues? The gentleman from California.

Mr. Berman. Thank you, Mr. Chairman. I am still confused by the direct marketer's notion of what they support and what they couldn't support. You say in the context of video, this legislation should be limited to retail rental establishments, leaving at least the implication that you would support legislation that was limited.

What is the logical distinction between a retail video establishment and a mail order video establishment?

Mr. Barton. One of them is, as I mentioned, the immediacy of the information that is available, and the ease for it to be given out.

Number two——

Mr. Berman. I don't understand that.

Mr. Barton. Well, you can walk into a video store and a clerk can give you the information you are asking for. You can't do that out of a mailing list. It is just—it doesn't exist in that form.

You could walk into the business office of a specific company and demand to see their transaction records, but that is the only way that you can get the kind of information that we are talking about, and that has never been done. People don't do that.

Mr. Berman. You are saying the reason for the distinction is that public disclosure is less likely to come from a mail order operation that we are getting our lists from than from a retail establishment that we are getting the list from.

Mr. Barton. Public disclosure of the information we are talking about, yes, much less. It doesn't come from getting a name off of a mailing list. In the first place, it is physically almost impossible to do that. We are talking with just mailing lists, not the business records of our companies or anything like that which are similar to Erol's.

We haven't had a problem with that. The second reason and let's be frank, the retail industry is asking for it, and we are not going to get into a fight with the videotape rental industry. If they want to restrict it on that level, that is fine. If they want to be protected against being inadvertently or directly giving information, being sued, I think that is fine with us.

We in the mailing industry don't have that problem.

Ms. Goldman. If I can add to that, I think one of the confusions here is that this legislation is not targeted at any particular industry. It is designed to protect certain kinds of information, regardless of whatever industry puts it out. I think that is a very important point that needs to be made here, because it is not as though the legislation is going after a particular industry.

Mr. Berman. It looks to me like just the opposite. This is legislation targeted at particular industries, rather than the kind of information. The books I might get from a book-of-the-month club would not be covered by this legislation, but books I get from the library will be covered.

The records, a lot of information that would seem to me to be of the kind of character that is covered in video stores will not be covered, because they aren't disseminated by those industries.

Ms. **Goldman**. The other point made earlier is that Erol's, for instance, says it doesn't program its computer to call up information by subject matter. That is because they are not in the mailing list business, and it is not necessary to do that, but it is very easy to do that.

Because their computers are not programmed that way at this time, nothing at this point precludes them from doing that and from disclosing the information to the public.

Mr. **Barton**. Mailing lists is not information disclosed to the public. We can pursue that.

Mr. **Stevenson**. As a practical matter, it would be an inappropriate business practice. I mean, if we were to do that with a number of stores, for example, that we have in the Washington area, we would be out of business, I am sure.

Mr. **Kastenmeier**. Mr. Barton, do you know of any other industry that might have concerns about these bills, other than your association?

Mr. **Barton**. Not directly, but I could be wrong about that. I haven't really thought about that. I think you are dealing with the concerned industries right here, the four of us.

Mr. **Kastenmeier**. Yes. The reason I ask is obviously the direct marketing associations do have concerns. We have had some concerns expressed about whether there ought to be court orders in civil actions available, and indeed, whether law enforcement might have some interest or concerns with respect to the bill.

But other than those concerns, I think there is a consensus that this legislation could be a step forward in addressing what is perceived as a problem.

And it is a good question raised by the gentleman from California as to whether it ought to be broadened or not. I guess we have tried to respond to what is perceived recently, in recent times, as a couple of potentially troublesome areas with respect to invasion of privacy, libraries and the video business. Some of the other industries or commercial applications, other types of book clubs and so forth, if—I guess, if there is not a perceived need, we have not attempted to broaden the legislation to include those areas.

That is why I think it is as it is today, as it appears before us. In any event, on behalf of the committee, I want to thank the four witnesses for their contribution this morning. We appreciate it very much.

The committee stands adjourned.

[Whereupon, at 11:55 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

ADDITIONAL STATEMENTS

STATEMENT OF SENATOR PAUL SIMON BEFORE A JOINT HEARING OF THE SENATE SUBCOMMITTEE ON TECHNOLOGY AND THE LAW AND THE HOUSE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE ON THE VIDEO AND LIBRARY PRIVACY PROTECTION ACT OF 1988

AUGUST 3, 1988

I am pleased to join with my colleagues in holding this joint hearing on legislation to protect one of the most treasured liberties of all, the right to privacy. There is no denying that the computer age has revolutionized our world. Over the past twenty years we have seen remarkable changes in the way each one of us goes about our lives. Our children learn through computers. We bank by machine. We watch movies in our living rooms. These technological innovations are exciting and as a nation we should be proud of the accomplishments we have made.

Yet as we continue to move ahead, we must protect time honored values that are so central to this society, particularly our right to privacy. The advent of the computer means not only that we can be more efficient than ever before, but that we have the ability to be more intrusive than ever before. Every day Americans are forced to provide to businesses and others personal information without having any control over where that information goes. Computer records are kept on where we travel, what we eat, what we buy, what we watch and what we read. These records are a window into our loves, likes and dislikes. As Justice Brandeis predicted over 40 years ago in his famous dissent in the Olmstead wiretap case

> time works changes, brings into existence new conditions and purposes... Subtler and more far reaching means of invading privacy have become available...Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court and by which it will be enabled to expose to a jury the most intimate occurences of the home.

This point was brought home to me during the course of the confirmation hearings on Judge Bork when I learned that a reporter had received from a local video store a list of the movies that Judge Bork and his family had rented. Who would guess that the choice of movies one watches in the privacy of the home would not be confidential?

The Video and Library Privacy Act of 1988 takes an important step in ensuring that individuals will maintain control over their personal information when renting or purchasing a movie or when borrowing a library book. The bill specifically provides for a federal cause of action in the event a list which identifies the books we read or the movies we watch is released. Since there are certain circumstances in which it may be necessary for this information to be divulged, the bill provides for some limited exceptions to the prohibition, including an exemption to cover legitimate law enforcement activities.

No doubt in the days and years ahead we will continue to make much progress in developing new technologies. While I am fully supportive of innovation and growth, I remain committed to protecting those principles which are so central to America. The legislation which is the subject of the hearing today strikes the necessary balance to ensure that our privacy will not be lost as we move ahead.

I look forward to the testimony of the witnesses and hope that we can move ahead on this legislation this year.

STATEMENT OF SENATOR ALAN K. SIMPSON
JOINT HEARING ON S. 2361
AUGUST 3, 1988
RAYBURN HOUSE OFFICE BUILDING 2237

First let me say that it is a real pleasure to be here this morning and to join the Senate Subcommittee on Technology and the Law and the House Subcommittee on Courts, Civil Liberties and the Administration of Justice. I thank Senator Leahy and Congressman Kastenmeier for allowing me the privilege of joining them here in order to receive the testimony of the witnesses in today's hearing.

The idea of legislation to protect the privacy rights on an individual's video club records or library records first arose during the hearings on the Bork nomination. It was then that I learned that a local reporter had decided to publish in a newspaper known as the "City Paper" the video rental record of Judge Bork -- as though that would be some great and dazzling story or delightfully entertaining piece or "investigative journalism" at its worse -- or simply "Creative Reporting About People," with the acronym of CRAP!

The fact was, and still is, is that it is nobody's business what videos are rented by Judge Bork or anyone else. It does not matter whether you are a nominee for the Supreme Court or the City Council or the School Board. As Judge Bork so articulately pointed out during his hearings, the Congress of the United States does have the power to legislate privacy rights if it wishes. Thus we are about that business now and I think it is certainly appropriate for both video records and library records.

It is that cherished American right of privacy that we are protecting with this legislation. People in this country may not even be able to read or understand the Constitution, but they surely can understand the concept of privacy in their personal lives. Plain old unmitigated unvarnished privacy. The right to be left alone. That is why such diverse groups are working on this bill in order to obtain its passage.

I do not mean to imply that the bill as currently drafted is perfect. Otherwise there would not be much reason for these hearings. I do think we can perhaps review some provisions in the bill and offer suggestions in how to increase its effectiveness without impinging on appropriate release and disclosure of personal records to law enforcement officials or under court order as appropriate.

I think we need to be especially careful that we do not overly restrict the access of such information to legitimate police inquiry where it is necessary to further investigations into criminal activities which may even affect national security through espionage. It may seem absurd to state that a person's video records or library records could somehow be connected with foreign counterintelligence and espionage. But it is quite apparent that just such foreign operatives are actively engaged in the use of our vast, easily accessible library system in order to recruit intelligence sources and to uncover information which perhaps should not be so readily accessible.

I look forward to working with the Senate and House Subcommittees and the Senate full Committee on the Judiciary on this important issue. As an original cosponsor of the Senate bill, I think it is most important that we pursue markup on the bill. I also want to thank members of these Subcommittees for the active involvement which they have taken in seeing this legislation through the process and the remarkable and consistent work of Congressman Al McCandless in the House to introduce the bill and work towards its passage. Thank you.

ADDITIONAL MATERIALS

Congress of the United States
House of Representatives
Washington, D.C. 20515

July 26, 1988

The Honorable William S. Sessions
Director
Federal Bureau of Investigation
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Mr. Sessions:

The House of Representatives Committee on the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice and the Senate Committee on the Judiciary Subcommittee on Technology and the Law are planning to conduct a joint hearing on H.R. 4947 and S. 2361 (copies enclosed), relating to the privacy rights of users of video and library services. The hearing will be held at 9:30 a.m. on Wednesday, August 3, 1988, in Room 2237 Rayburn House Office Building.

We would like to invite you or your designee to appear and testify on H.R. 4947 and S. 2361. Please summarize your opening statement so that it does not exceed five minutes. Enclosed you will find a notice which sets forth the House Judiciary Committee's requirement that prepared statements be filed at least 48 hours prior to your scheduled appearance. In accordance with Committee policy, fifty copies of your statement must be submitted by no later than 9:30 a.m. on August 1, 1988. Due to the large number of Members who will be attending the hearing, an extra fifty statements would be appreciated. Please forward 50 copies to the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, 2137 Rayburn House Office Building, Washington, D.C. 20515, and 50 copies to the Senate Subcommittee on Technology and the Law, 224 Dirksen Senate Office Building, Washington, D.C. 20510.

The Honorable William S. Sessions
July 26, 1988
Page #2

Please do not hesitate to contact either Committee at 225-3926 or 224-3406 if you need further information.

Your earliest acceptance of this invitation would be appreciated.

Sincerely,

Patrick Leahy

PATRICK J. LEAHY
Chairman
Senate Subcommittee on
Technology and the Law

Peter W. R

PETER W. RODINO, JR.
Chairman
House Committee on
the Judiciary

PWR:vsj
Enclosure

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

August 2, 1988

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C.

Dear Mr. Chairman:

Thank you for your letter dated July 26, 1988, inviting me to appear at the joint hearing of the House Committee on the Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice and the Senate Committee on the Judiciary Subcommittee on Technology and the Law on August 3, 1988, to testify on issues related to the privacy rights of users of video and library services. I must decline the invitation but would like to offer comments on H.R. 4947 and S. 2361 which I will provide to you by separate letter.

Sincerely yours,

William S. Sessions
Director

FBI/DOJ

OFFICE FOR INTELLECTUAL FREEDOM
AMERICAN LIBRARY ASSOCIATION
50 EAST HURON STREET · CHICAGO ILLINOIS 60611 · (312) 944-6780

August 25, 1988

The Honorable Robert Kastenmeier
2328 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Patrick Leahy
Chairman
Subcommittee on Technology and the Law
SH-815 Hart Senate Office Building
Washington D.C. 20510

Dear Representative Kastenmeier and Senator Leahy:

On behalf of the American Library Association, I want to thank you for holding the joint hearing August 3 on H.R. 4947/S. 2361.

This bill is a major step forward in protecting the privacy rights of Americans. If enacted, this bill would establish a uniform federal standard which would protect the privacy of library users. This standard would be a complement to that which 38 states have already adopted and would be controlling in states where no similar law exists.

The difference between the House and Senate versions on the detail of whether a court ordered disclosure could occur in civil as well as in criminal matters received much discussion. Our view would be that the most important concept here is that of a court order as the required vehicle for disclosure. We recognize and agree with the view expressed by Senator Leahy limiting the grounds for such an order to a criminal proceeding.

Since the hearing, my colleagues and I have continued to work with staff on language and to respond to their questions. We are grateful for your support and interest in this matter.

Sincerely,

C. James Schmidt/bas

C. James Schmidt, Chair
Intellectual Freedom Committee

CJS:bas

AMERICAN LIBRARY ASSOCIATION
50 EAST HURON STREET · CHICAGO, ILLINOIS 60611 · (312) 944-6780

September 23, 1988

The Honorable Robert W. Kastenmeier
2328 Rayburn House Office Building
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Kastenmeier:

On behalf of the American Library Association, I am writing to express our strong support for the Video and Library Privacy Protection Act of 1988, HR 4947, legislation that would create a federal right to privacy in personally identifiable library use records and video rental or sale records.

Thirty-eight states, plus the District of Columbia, have passed laws protecting the confidentiality of library use records. In addition, since 1970, the ALA and its more than 45,000 member librarians, library trustees, and libraries have had a policy: a) that library circulation records are confidential in nature; and b) that such records should not be made available to any other party except pursuant to a court order issued by a judicial authority.

The ALA opposes any amendment to the proposed legislation which would create a "national security letter" disclosure process. Particularly in view of the Federal Bureau of Investigation's repeated testimony before House and Senate committees that the Bureau is not interested in library records, and has never requested or received library records, we fail to see any justification for creating a special disclosure process to provide access to library records for the FBI or other law enforcement agencies.

Further, the adoption of any amendment to HR 4947 to create a "national security letter" disclosure process may authorize a part of the FBI Library Awareness Program, or similar activities. Both the House and Senate recently have held hearings on these activities. Creating a "national security letter" disclosure process at this time appears to ALA to grant tacit approval to the Bureau program(s). ALA believes that taking action which appears to endorse the very activities now under congressional scrutiny naturally undermines the integrity of the investigations, and may defeat their purpose outright.

A court order, obtained upon good cause shown to the appropriate judicial authority, is the proper vehicle for obtaining library records.

We believe the court order standard in HR 4947 is the only justifiable standard to require production of such records, and it will not impede legitimate law enforcement interests. Furthermore, this process protects librarians with a uniform standard to be applied when librarians are faced with one of the most crucial dilemmas of their profession, a choice between maintaining their professional ethics, or acceding to requests by law enforcement authorities.

Again, we strongly support the single court order standard now in the bill, and we urge the Committee on the Judiciary to defeat any amendment relating to a "national security letter" disclosure process.

Thank you for your consideration.

Sincerely,

Judith F. Krug

Judith F. Krug
Director
Office for Intellectual Freedom

JFK:tj

Special Libraries Association

1700 Eighteenth Street, N.W.
Washington, D.C. 20009
202/234-4700

September 26, 1988

The Honorable Peter W. Rodino, Jr.
Chairman
House Judiciary Committee
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the Special Libraries Association, I want to express our support for the confidentiality of library records maintained by public institutions. In this regard, we are pleased that the House Judiciary Committee will be considering legislation which embodies this principle, H.R. 4947, the Video and Library Privacy Protection Act of 1988.

As the bill now stands, library records could only be obtained with the approval of the individual involved or by a court order. We are chagrined to learn that the Federal Bureau of Investigation is attempting to get a "national security letter" exemption. This would enable the FBI to get confidential library records without judicial review or notification of the subject in question.

In our opinion, this circumvents the intent of the legislation and enables the FBI to obtain library records without showing cause. The Association opposes the activities of the FBI's Library Awareness Program and views this national security exemption as a way for this agency to continue its program, with, in essence, Congressional approval.

Interestingly, the FBI has stated in Congressional hearings that it is not interested in obtaining library records. We would question, therefore, why the agency deems it necessary to seek an exemption in this legislation.

We urge you, as a member of the House Judiciary Committee, to oppose any national security exemption for any federal agency including the FBI during consideration of the Video and Library Privacy Protection Act of 1988.

Sincerely,

David R. Bender

David R. Bender, Ph.D.
Executive Director

DRB/lh

David R. Bender, Executive Director
Richard D. Battaglia, Associate Executive Director

People For The American Way
ACTION FUND

October 3, 1988

The Honorable Robert Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
2137 Rayburn
Washington, D.C. 20515

Dear Chairman Kastenmeier,

On behalf of the 270,000 members of the People For the American Way Action Fund, a nonpartisan constitutional liberties organization, I urge your support for H.R. 4947, the Video and Library Privacy Act. The Courts, Civil Liberties and the Administration of Justice Subcommittee is scheduled to mark up H.R. 4947 on Tuesday, October 4, 1988. The bill is an essential safeguard against the wrongful disclosure of information relating to an individual's use of libraries, and the use of services involving video rental or sale. America is in the midst of an information revolution in which a balance must be struck between the increased ability to acquire information, and the need to protect personal privacy.

Evidence of the need for the bill is apparent in several actions brought to the attention of the public:

- In 1988, it was revealed that the Federal Bureau of Investigation, as part of its controversial "Library Awareness Program," has attempted to obtain library circulation records as part of a counter-intelligence effort. The FBI's program has frequently been conducted without regard to the library confidentiality laws of some of the 38 states around the country which have such laws. Such activities threaten constitutional rights to privacy, and ironically, suspend democratic freedoms in the name of protecting democracy.

- In 1987, a Washington, D.C., newspaper published the videotape rental record of the family of Supreme Court nominee Judge Bork. According to press accounts, the profile of the Bork family's viewing habits was leaked to a reporter by someone with access to the computer videotape rental files. We believe that the release of such information is a clear violation of the right to privacy. Citizens who rent videos to view in the privacy of their own homes do so with the expectation that their choices are a private matter.

2000 M Street, NW, Suite 400, Washington, D.C. 20036 (202) 467-4999

H.R. 4947 creates important enforcement mechanisms to protect against wrongful disclosure of video records: (1) civil penalties for infractions (2) requirement of written consent from consumer for disclosure of personal identifiable information at time the disclosure is sought. Currently such information about individuals is released unless it is expressly prohibited. People For the American Way Action Fund strongly supports the new enforcement and consent provisions.

Americans must be assured that their choices of library materials and video transactions are kept private. H.R. 4947 creates such clear and uniform protections in federal law. People For the American Way Action Fund urges Congress and the President to support the "Video and Library Protection Act," and to oppose all weakening amendments.

Sincerely,

John H. Buchanan, Jr.
Chairman

Arthur J. Kropp
President

Association of Research Libraries
1527 New Hampshire Avenue, N.W., Washington, D.C. 20036 (202) 232-2466

DUANE E. WEBSTER
Executive Director

September 26, 1988

The Honorable Robert Kastenmeier
U.S. House of Representatives
2328 Rayburn House Office Bldg.
Washington, D.C. 20515

Dear Congressman Kastenmeier:

This letter is to convey the support of the Association of Research Libraries for the Video and Libraly Privacy Protection Act of 1988, HR 4947. The provisions of the bill are in harmony with the policies of research libraries and such a federal law will strengthen protection for the confidentiality of library records by prohibiting their disclosure except with the person's consent or under court order.

In a related matter, ARL follows the investigation of the FBI Library Awareness Program by the Civil and Constitutional Rights Subcommittee. ARL has formally opposed the Library Awareness Program and we have asked FBI Director Sessions to publicly disavow the program. We await with considerable interest the next steps in the Subcommittee investigation.

We now understand there may be a national security letter exemption in the Video and Library Privacy Protection Act that allows the FBI to gain access to records without court order pursuant to foreign counterintelligence activity. We strongly oppose this provision. We also do not understand the rationale for considering it as part of HR 4947.

It is ARL's position that library records deserve to be protected by a higher standard than this exemption provides. Library records represent First Amendment activities - to receive and exchange information - and should be revealed only after a judicial review determines it is necessary. In addition, the FBI has said publicly that they are not interested in, nor do they seek to see library records. So what is the need for exempting the Bureau from the Video and Library Privacy Protection Act?

A mandatory or permissive national security letter exemption in HR 4947 would in part authorize, or be perceived by library users as authorization, for the Library Awareness Program and other similar activities. Adoption of this exemption would also put an end to the Congressional investigation of the Library Awareness Program. Given the negative publicity and questions that remain unanswered by the FBI about the Library Awareness Program, these are not desirable consequences.

ARL urges that the House address the two issues separately by passing the Video and Library Records Protection Act this session but without a national security letter exemption. This action would strengthen protection for the confidentiality of video and library records and allow the ongoing Congressional investigation in the Library Awareness Program to continue.

Sincerely,

Duane Webster

Duane E. Webster
Executive Director

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
Telephone: 202-225-3951

September 22, 1988

The Honorable Louis Stokes
Chairman
Permanent Select Committee
  on Intelligence
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We are writing to you about H.R. 4947, the Video and Library Privacy Protection Act of 1988, which prohibits the unauthorized disclosure of video and library records. The bill has broad, bipartisan support. It was introduced in response to the disclosure of Judge Robert Bork's video store records during his Supreme Court nomination hearings, and was expanded to include libraries, where the potential for similar abuses is great.

We understand that representatives of the Federal Bureau of Investigation have spoken with certain Members about possible amendments to the bill. We are greatly concerned that these amendments not be permitted to impede the progress of the bill, which is presently being marked up by the Subcommittee on Courts, Civil Liberties and the Administration of Justice. We expect the bill to be favorably reported by the Subcommittee, and to proceed to full Judiciary Committee consideration next week.

We stress that the FBI has never formally contacted us about any problems with H.R. 4947. Counsel to the Subcommittee met with FBI representatives last July 13, and the Bureau was informally invited to testify at the Subcommittee's August 3 hearing. A formal invitation letter was issued on July 26, 1988. The Bureau declined these invitations, both informally to Subcommittee counsel, and in an August 2, 1988 letter from Director William Sessions. On both occasions, however, the Bureau promised to submit written comments on the bill. We have never received any such comments.

Our understanding, however, is that the Bureau has eight specific problems with H.R. 4947. Seven of the problems relate generally to the scope of materials prohibited from disclosure, and to the standards by which law enforcement agencies may seek court ordered disclosure of video and library records. The Bureau apparently believes that these standards are too onerous.

and we are willing to seek appropriate amendments at the full Committee markup to rectify these seven concerns.

The eighth proposal is a request that the FBI be permitted to obtain video and library records without seeking a court order, through a national security letter. While we recognize that such a procedure has been authorized in other laws, relating to bank and telephone toll records, we strongly believe that this procedure is inappropriate in this context. First, the materials protected by H.R. 4947 are protected by the First Amendment, and thus entitled to the strongest possible prohibition against disclosure. Second, the FBI has simply not made any case that the national security letter procedure is warranted here. In testimony about the Library Awareness Program before the Subcommittee on Civil and Constitutional Rights last July, the Bureau testified that "I can assure you that the FBI is not now nor has it ever been interested in the reading habits of American citizens. . . I have found no situation at all where we got any records or any information on any U.S. person as far as library records or personal information goes, any." In either the video or library context, there has been no evidence to the contrary.

We are more than willing to accommodate the FBI in its legitimate law enforcement needs. However, the Bureau does not need a national security letter exemption and to permit it would create such a large hole in the bill as to render our efforts futile. The insertion of a national security letter exemption would be seen by the library community as congressional authorization for the Library Awareness Program, which, as you know, has generated tremendous concern among librarians. Given the questions raised by the Bureau's conduct in the CISPES case, where extensive use was made of the national security letter to obtain bank and telephone toll records, this is no time to authorize further use of the technique, particularly for records with First Amendment implications, such as library and video records.

We hope that you will not act favorably on any request that the House Committee on Intelligence seek a sequential referral on H.R. 4947. Please feel free to contact either of us if you need more information about this matter.

Sincerely,

ROBERT W. KASTENMEIER
Chairman
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

Don Edwards
DON EDWARDS
Chairman
Subcommittee on Civil
and Constitutional Rights

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 27 1988

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
House of Representatives
Washington, D.C.

Dear Mr. Chairman:

I am writing to comment on H.R. 4947 and S. 2361, bills which would regulate the manner in which law enforcement agencies obtain records from libraries and video stores.

Of significant concern to the FBI and other law enforcement agencies is the cumulative effect that this legislation and other similar legislative initiatives have on law enforcement's ability to protect the public safety and ensure the national security. The notification requirements and the administrative burden necessary to obtain such information will deter law enforcement requests for such information. More importantly, the standards contained in these bills are tantamount to an absolute prohibition of disclosure of personally identifiable information to law enforcement agencies for investigative purposes.

One of the exceptions created by the bills would provide for the disclosure of information incidental to or necessary for legitimate business concerns. It is troublesome that information prohibited for law enforcement purposes could be readily disclosed for business purposes.

I understand that 38 states have already acted to provide for confidentiality of library records. Federal legislation for library confidentiality is an intrusion into areas traditionally regulated by the States. Regulation of video record confidentiality by the States is to be expected. If Congress, however, determines that Federal legislation is required to protect personally identifiable information held by video service providers and libraries, I offer the following recommendations that would ensure essential law enforcement investigative needs can be fulfilled while providing an independent review to determine if the information is needed for legitimate law enforcement purposes or required to protect the national security. Although these recommendations will provide for basic needs, from a public safety standpoint a general exemption would be preferred.

S. 2361 contains a definition of personally identifiable information. I recommend that definition be included in the House bill. Provisions of each bill address the disclosure of personally identifiable information to Federal and state law enforcement agencies. The provisions that notice be given to the subject of the information about a court proceeding providing for disclosure are often contrary to law enforcement interests in that they acknowledge the existence of an investigation. Also troublesome is the standard of "clear and convincing evidence" that the subject of the information is reasonably suspected (S. 2361) of engaging in or has engaged (H.R. 4947) in criminal activity and that the information sought would be highly probative to the case. "Clear and convincing" is not a term frequently used in criminal matters. It should be clearly defined, and if it remains in the bills, should be distinguished from the higher standard of probable cause.

H.R. 4947 would add an additional requirement that law enforcement must show that other less intrusive investigative processes have been utilized or would not succeed. Although a similar provision appears in the Federal wiretapping statute, it is observed that electronic surveillance is an extraordinary investigative technique and is usually used to obtain information directly from suspects, not third parties. It also invades an area in which there is a high expectation of privacy. H.R. 4947 also requires a showing of why the value of the information sought would outweigh competing privacy interests. These standards would effectively prohibit law enforcement agencies from obtaining video and library records for investigative purposes.

To remedy these problems, I recommend that disclosure to law enforcement agencies be allowed by two authorities: a court order and a grand jury subpoena. The standards for issuance of a court order or subpoena would be identical to the standards for those instruments as required by a court or a grand jury for issuance. Either could provide for nondisclosure to the subject of the records.

A third disclosure process by "national security letter" should be fashioned to parallel the Electronic Communications Privacy Act (18 U.S.C. Sec. 2709) or the Right to Financial Privacy Act (12 U.S.C. Sec. 3414(a)) which permit the disclosure of telephone toll records and financial institution records when a certification is made that records sought are for foreign counterintelligence purposes and that there are specific and articulable facts giving reason to believe that the customer or entity whose records are sought is a foreign power or an agent of a foreign power. Without this procedure, the FBI could not effectively monitor and counter clandestine activities of hostile espionage agents and terrorists. The standard of "specific and articulable facts" is lower than the probable cause or "clear and convincing evidence" standards. It is the standard used for disclosure of financial and telephone toll records in counterintelligence investigations. The national security letter process will, however, limit access, and if coupled with a semi-annual reporting procedure, similar to that contained in the Right to Financial Privacy Act, can be reviewed by appropriate congressional oversight committees.

As noted above, our estimates show that such disclosure procedures would have limited use. It is, however, important that if Federal confidentiality legislation is adopted relating to video services and library services, that there be procedures available that will allow legitimate Federal, state and local law enforcement needs to be served in a reasonable manner, balancing public safety and the national security with personal privacy interests.

In conclusion, these recommendations provide for minimal law enforcement interests. Although Federal law enforcement agencies could perhaps work effectively under a new records disclosure process, I fear the impact of such legislation will cause serious problems on the quality and effectiveness of local law enforcement where work is of a more reactive nature and where the abilities to deal with such procedures are more limited.

Honorable Robert W. Kastenmeier

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Tom Boyd

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Acting Assistant Attorney
General
Office of Legislative Affairs

1 - Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C.

1 - Honorable Hamilton Fish
House of Representatives
Washington, D.C.

1 - Honorable Don Edwards
Chairman
Subcommittee on Civil
and Constitutional Rights
Committee on the Judiciary
House of Representatives
Washington, D.C.

1 - Honorable J. Moorhead
House of Representatives
Washington, D.C.